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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

IDA ALBARADO, HELEN B. H. CHU, HENRY J. CHU, CHEE KUNG FUI SOCIETY, LAPAZ FRANCISCO, MARCELLINO FRANCISCO, ALBERT K. KAAILAU, LINDA P. KAIAKAPU, ANN N. KALI, HARRIET U. KANO, JUNICHI KANO, KIYOSHI KIMATA, ARNOLD W. F. LEONG, KATHERINE A. LEONG, LO SUN D. LEONG, TAI HING LEONG, HANAYO T. NAUMU, WALLACE A. NAUMU, HIDEO NONAKA, HIROMI NONAKA, IWAO NONAKA, KAZUO NONAKA, MASATOSHI NONAKA, SHIGEKICHI NONAKA, TAKANO NONAKA and TAKAO NONAKA, *Petitioners,*

v.

STATE OF HAWAII, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioners IDA ALBARADO, HELEN B. H. CHU, HENRY J. CHU, CHEE KUNG FUI SOCIETY, LAPAZ FRANCISCO, MARCELLINO FRANCISCO, ALBERT K. KAAILAU, LINDA P. KAIAKAPU, ANN N. KALI, HARRIET U. KANO, JUNICHI KANO, KIYOSHI KIMATA, ARNOLD W. F. LEONG, KATHERINE A. LEONG, LO SUN D. LEONG, TAI HING LEONG, HANAYO T. NAUMU, WALLACE A. NAUMU, HIDEO NONAKA, HIROMI NONAKA, IWAO NONAKA, KAZUO NONAKA, MASATOSHI NONAKA, SHIGEKICHI NONAKA, TAKANO NONAKA and TAKAO NONAKA, herein sometimes called collectively the "Small Owners", pray

that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Hawaii entered in this cause on December 28, 1973.

OPINIONS BELOW

The initial opinion of the Hawaii Supreme Court ("the court below") is reported, with dissenting opinion, at 54 Haw. 174 (1973), App. p. 66. That court's opinion on rehearing, with two dissenting opinions, dated December 20, 1973, is reported at 55 Haw. 260 (1973), App. p. 114. The Hawaii Fifth Circuit Court ("the trial court") Decision, is not reported. Copies of the opinions, the Decision of the trial court and of the Judgment of the Hawaii Supreme Court are included in a Joint Appendix separately presented on behalf of Petitioners herein, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and Selwyn A. Robinson, et al., all of whom seek review of the same judgment.

JURISDICTION

The original decision of the court below was filed on January 10, 1973 and, before the entry of judgment thereon, a timely Petition for Rehearing was filed on May 18, 1973 by Petitioners. An order filed June 18, 1973 allowed partial rehearing. The opinion on rehearing was filed December 20, 1973, and judgment was entered on December 28, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the court below, by its decision, which held, based upon a construction and application of Hawaii Rev. Stat. § 7-1, that all water in streams is property of the State, subject to riparian and appurtenant rights, and that appurtenant waters may no

longer be transferred away from the taro lands to which they were originally appurtenant for use elsewhere, effected a taking on behalf of the State of Hawaii of Petitioners' property without just compensation, in violation of the Due Process Clause of the Fourteenth Amendment.

2. Whether the court below, by deciding the issue of transferability of appurtenant water rights, not raised on appeal by any of the parties, without prior notice to Petitioners and without granting Petitioners a hearing, has so far departed from the usual course of judicial proceedings as to constitute a denial of Petitioners' right to a hearing and a taking of property in violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether the rules of federal law applicable to protect vested water rights enunciated in the provisions of 43 U.S.C. § 661 give federal protection to the Petitioners as the possessors and owners of vested rights in water under recognized customs, laws and decisions of courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

43 U.S.C. § 661 provides:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manu-

facturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . ."

Hawaii Rev. Stat. § 7-1 (derived from Act of August 6, 1850, Sec. 7) provides, in full:

> **"Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use."

STATEMENT OF THE CASE

Petitioners are owners of land in Hanapepe Valley, Island of Kauai, Hawaii, having appurtenant water rights.[1] Under recognized Hawaiian law, those water rights include the right to sever or transfer ownership away from the land to which the water was

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[1] "Appurtenant" water rights are those which follow from the fact that just prior to the first passage of title to the lands from the King of Hawaii into private ownership, water was being used thereon. Territory v. Gay, 31 Haw. 376, 383 (1930). These water rights are usually those associated with lands used by the ancient Hawaiians for taro culture and passed with the conveyance of the lands without specific mention as an easement appurtenant. Peck v. Bailey, 8 Haw. 658, 661 (1867).

originally appurtenant and the right to divert and use the water on other lands.[2] Almost the entire value of appurtenant water rights inheres in this right of transferability.[3]

Petitioners were joined as defendants in the present suit instituted in 1959 by McBryde Sugar Company, Limited ("McBryde") pursuant to Part III, Chapter 664, Hawaii Rev. Stat., to adjudicate the ownership "in conformity with vested rights"[4] of all waters of the Hanapepe Valley not previously adjudicated in *Territory* v. *Gay,* 31 Haw. 376 (1930), affirmed, 52 F.2d 356 (CA 9th, 1931), certiorari denied, 284 U.S. 677 (1931).

The State of Hawaii never challenged Petitioners' rights to sever the ownership of their water rights from the land with which they originally passed as an appurtenance, or to transfer those waters for use on other lands, whether or not within the watershed of origin. The State itself claimed and was awarded

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[2] Peck v. Bailey, 8 Haw. 658 (1867); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Horner v. Kumuliilii, 10 Haw. 174 (1895); Wong Leong v. Irwin, 10 Haw. 265 (1896); Palolo Land & Improvement Co. v. Wong Quai, 15 Haw. 554 (1903); In re Taxes, Waiahole Water Co., 21 Haw. 679 (1913); Foster v. Waiahole Water Co., 25 Haw. 726 (1921); Territory v. Gay, 31 Haw. 376 (1930).

[3] While the ancient Hawaiian subsistence economy was based upon taro production, with the advent of a modern society the value of water for taro production virtually disappeared, and appurtenant waters have retained value only because they are transferable away from taro patches in valley bottoms to dry lands on the plains above for use in the irrigation of sugar cane and other crops. The 50,050 gallons of water per acre per day awarded Petitioners by the trial court for each acre having appurtenant water rights is many times more water than is usable for any crop other than taro or rice in paddy culture. Sugar cane requires 10,000 gallons per acre per day or less.

[4] Hawaii Rev. Stat. § 664-34.

appurtenant water rights which had been severed from the land to which originally appurtenant.[5] The sole issues before the trial court affecting Petitioners were the determination of what lands had appurtenant water rights by virtue of ancient Hawaiian taro culture thereon and the amount of water to which each such acre was entitled.

Following a four-month trial in 1965, on December 10, 1968 the trial court entered its decision determining which of Petitioners' lands were entitled to appurtenant water rights and awarding to Petitioners 50,050 gallons of water per day for each acre so entitled. Petitioners, together with the other small owners of appurtenant water rights, were awarded a total of 1.4 million gallons per day. The trial court's decision also made major awards of appurtenant water out of the substantial flow of the nonnavigable Hanapepe stream[6] to the partners of Gay & Robinson (who lease some of their lands and waters to Olokele Sugar Company, Limited) and McBryde, the three sugar plantations involved in the litigation, each of which diverts its water from Hanapepe Valley for use on lands outside the watershed, and to the State of Hawaii, which leases part of its water to private persons for agricultural use, both within and without the valley, and diverts part through a county water works for munici-

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[5] Amended Judgment, Schedule B, Record Doc. No. 34.

[6] "Total water available is 32 million gallons per day or less ten per cent of the time. Total water available is 145 million gallons or more per day another ten per cent of the time. During the remaining eighty per cent of the time, the total water available is between 32 million and 145 million gallons per day." (Decision, Finding 9, App. p. 6.)

pal use on lands distant from those to which the waters diverted were originally appurtenant.[7]

The Amended Judgment awarded Petitioners absolute ownership of a definite quantity of water satisfactory to Petitioners. No appeal was filed by Petitioners.

Separate appeals to the Hawaii Supreme Court were filed by McBryde, Gay & Robinson and the State. The appeals of those parties were limited to questions concerning the amount of appurtenant, prescriptive and storm and freshet waters to which each of them was entitled. No appeal questioned the awards made to Petitioners or the transferability of water or the right of severance and sale of water rights apart from the land involved. No notice of the appeal of any party was served upon any of Petitioners.[8]

On January 10, 1973, with one Justice dissenting, the Hawaii Supreme Court entered an opinion holding, *inter alia,* that "the right to the use of water ac-

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[7] The trial court's decision includes awards of appurtenant water rights to certain of the small land owners, as well as to the State, McBryde and Gay & Robinson for water rights severed and reserved when the land was conveyed away at some time prior to the trial. (See Amended Judgment, Schedules A, B, C and D, Record Doc. No. 34.) These awards of appurtenant water rights were affirmed by the Hawaii Supreme Court, yet, since those parties no longer own the lands to which the reserved water rights were originally appurtenant, the lower court's decision prohibiting use thereof except on the lands to which originally appurtenant means that those water rights cannot be used by their owners at all.

[8] The lower court's own rules (Hawaii Rules Civ. Proc., Rules 73(b) and 5(a)) and decisions would have required notice to Petitioners if anything involved in the appeal was to affect them. Kealoha v. Halawa Plantation, 24 Haw. 436 (1918); Madden v. Madden, 44 Haw. 442 (1960). Obviously, neither the State nor any other party to the appeal believed the appeal in any way affected Petitioners.

quired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled", thus making such water rights, for the first time, and contrary to a more than a century of judicial precedent and private and governmental recognition, nonseparable, nontransferable and useful only on the taro land on which the water was being used when that land first came into allodial ownership during the reign of Kamehameha III.[9] The lower court makes no attempt to base this revolutionary decision on any prior State precedent, relying solely on Hawaii Rev. Stat. § 7-1,[10] and a dictionary definition of the word "appurtenant".[11]

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[9] 54 Haw. at 191, App. p. 83.

[10] As stated by Justice Levinson in his dissenting opinion on rehearing (55 Haw. at 284, App. p. 138):

> "The court's reasoning was bottomed wholly on section 7 of the Enactment of Further Principles, originally published as L.1850, § 7, at 202, and presently compiled in HRS § 7-1 which, in its English version, guarantees to the 'people . . . a right to drinking water [and] running water,' and also declares that '[t]he springs of water [and] running water shall be free to all, on all lands granted in fee simple.' Based on this guage, and the historical generalization that 'the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts,' 54 Haw. at 193, 504 P.2d at 1342 [App. p. 85], the court concluded that privately owned water may only be used in connection with the land to which it is appurtenant and may not transported to kula [dry] land elsewhere. . . ." (footnote omitted).

[11] 54 Haw. at 190, App. p. 82. This reliance is particularly anomalous in that the water rights concerned were conceived of as and called "prescriptive rights" in early Hawaiian cases, only later being denominated "appurtenant rights" in order to distinguish them from rights acquired by adverse user. Territory v. Gay, 31 Haw. 376, 383-4 (1930).

By the court's decision, Petitioners are prevented from continuing their long-established practice of using waters appurtenant to some of their lands upon other lands not having such water rights. Petitioners are further deprived of the right to sell their water rights to others (usually one of the three sugar plantations, each of which plantations has use for the water only outside the valley).[12] Those who own appurtenant water rights already severed from the land to which originally appurtenant cannot, under the lower court's decision, use them anywhere at all and are thus deprived of their entire value.

By proscribing the transferability and severability of all appurtenant waters in the State, the court expropriated for the State, by bringing into the public domain, the very waters that had been for almost a century used in irrigation by private owners of lands having appurtenant rights on other lands both within and outside the watershed of origin.[13] This radical

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[12] This loss is substantial. As was called to the lower court's attention at the oral argument on rehearing, the long-recognized rule of thumb for such sales in Hanapepe Valley was one acre of water rights for one acre of dry land. Thus, by exchanging their water rights for dry land, Petitioners could double their landholdings if they desired to cease agricultural activity, or, by so exchanging a portion of their water rights, could increase their arable land for crops requiring less water than taro.

[13] For example, Petitioner Hideo Nonaka's ten-acre irrigated truck garden contains only four acres having water rights. By the lower court's decision, he can no longer grow vegetables requiring irrigation on the six acres not having water rights, and, since he is also effectively prohibited from selling his "nontransferable" water to anyone else, he has lost not only the value of the unused water as property, but also has been deprived of the economic value of his other six acres of dry land for irrigated agricultural

and unpredictable change in property rights was made on the basis of a record directed to other issues, a record that includes no reference to transferability of water nor any evidence relating to, nor any claim of, nontransferability of such waters, either by the State or any other party. The lower court's decision on these matters has not been the subject of any evidentiary hearing or other proceeding permitting Petitioners to defend their rights or to claim just compensation for the taking of their property.

On first learning of the decision of January 10, 1973 [14] (no formal notice having been given to Petitioners), Petitioners filed a Petition for Rehearing, and, thereafter, a further brief, following the lower court's order permitting additional briefing. In their petition and brief, Petitioners asserted that the construction and application of Hawaii Rev. Stat. § 7-1 to prohibit the sale or transfer of appurtenant rights would constitute a taking of vested rights without

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use. The so-called riparian rights newly created by the lower court are no substitute. First, almost all the land in Hanapepe having appurtenant rights is neither located on nor capable of being watered directly from the stream, such lands being watered from ancient level ditches bringing water from a removal point far upstream. Second, the riparian rights created require return to the stream undiminished. Hawaiian water rights have always been consumptive rights—rights to the use of water without necessity of return to the stream.

[14] The lower court also violated State statutes by its decision—Hawaii Rev. Stat. § 602-5 limits the lower court's jurisdiction to questions properly brought before it on appeal; Hawaii Rev. Stat. § 602-13 (in effect at the time of the decision) prohibited the lower court from deciding a case on any point material to the decision thereof not raised or argued by counsel on either side without first allowing argument of counsel on that point.

compensation and without due process of law;[15] that the decision of the court constituted a taking of vested property rights without compensation, contrary to the Due Process Clause of the Fourteenth Amendment;[16] that the decision deprived Petitioners of their constitutional right to a hearing pursuant to the Due Process

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[15] Brief Per Order of June 18, 1973, on Behalf of Ida Albarado, et al. (hereinafter cited "Brief of Albarado"), Record Doc. No. 70, pp. 21-22: "The seventh section of the Act of August 6, 1850, as amended [Hawaii Rev. Stat. § 7-1], was not intended to be other than declaratory of certain reserved rights of the former tenants of particular lands, when their former landlords took allodial titles, ... To hold otherwise would be to take away valuable vested rights without compensation and without due process of law, ..."

[16] Petition for Rehearing . . . of Ida Albarado, et al. (hereinafter cited "Petition for Rehearing of Albarado), Record Doc. No. 61, p. x: The decision deprives [Petitioners] of their vested rights to property . . . in violation of the United States and State Constitutions . . ."; p. 6: "It is, therefore, the contention of the Small Owners that the decision of this Honorable Court as it relates to depriving the Small Owners of the right to sever and transfer their waters to any source they want, whether or not within the watershed of origin, is a taking of property without due process, . . ."; p. 8: "By limiting the place of use of the Small Owners' waters, once the Small Owners put such lands to a use other than agricultural, the value of those waters is entirely destroyed. No such taking or damage is constitutionally permissible without a hearing and without compensation."; pp. 8-9: ". . . [T]he taking of the Small Owners' valuable right to transport their waters to other lands, either in or out of the Hanapepe watershed, by severing such waters from the land involved, a vested right long recognized in this jurisdiction, is a taking in violation of those [Fourteenth Amendment] provisions. See *Saunders* v. *Shaw*, 244 U.S. 317 (1917), *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930) . . ."; Brief of Albarado, Record Doc. No. 70, p. 2: "The rights of the Small Owners are vested rights which cannot constitutionally be divested without full payment for any such taking."

Clause of the Fourteenth Amendment;[17] and on the further ground that such decision was in violation of rules of federal law enunciated in 43 U.S.C. § 661, applicable to protect Petitioners' vested property rights in water.[18]

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[17] Petition for Rehearing of Albarado, Record Doc. No. 61, p. viii: ". . . [T]he Small Owners and other owners of ancient appurtenant water rights in Hanapepe Valley have freely bought and sold their water rights and caused them to be transferred to other lands in Hanapepe Valley or transferred to one of the three plantation companies using water from the Valley, which thereupon diverted the water from the Valley to lands outside the Valley, most of which are in another watershed. By the decision of the Court entered on January 10, 1973, this valuable property right has been taken away from the Small Owners, without any opportunity for them (or any other party) to be heard on such point, . . ."; p. 2: ". . . [T]he decision of this Court holding, without any opportunity for hearing by the Small Owners on the issue . . . contravenes not only [Hawaii Rev. Stat.] Section 602-5 but also, of course, the constitutional limitations of the United States and State Constitutions prohibiting the taking of property without due process of law . . ."; p. 3: "Such a due process hearing is not only required by Section 602-13, Hawaii Revised Statutes, but is also required by the rules of both procedural and substantive due process under the United States and State Constitutions . . ."; pp. 8-9: "Probably the most fundamental procedural requirement of the United State Constitution, particularly the Fourteenth Amendment of the United State Constitution, . . . is that an opportunity for a hearing be had before deprivation of property by any state. . . . As recently as February of this year, this Court in *In re Castle* [54 Haw. 276, 506 P.2d 1 (1973)] has rigorously defended the due process guarantee. (Though in that case the Court's rigorous defense of such right was in favor of the State, we trust that no lesser rule should apply to due process for individuals.)"

[18] Petition for Rehearing of Albarado, Record Doc. No. 61, p. 7: "Not only are normal protections of the Constitution of the United States applicable to the rights of the Small Owners sought to be destroyed by the Court herein, but also the provisions of the Treaty of Annexation between the Republic of Hawaii and the United States of 1897, the Act of Congress to provide a Government for the Territory of Hawaii of April 30, 1900 (31 Stat. 141),

Petitioners' Petition for Rehearing raised the foregoing federal constitutional issues, and the other federal issues, at the earliest opportunity,[19] but such issues were not allowed to be argued before[20] and were not determined by the Hawaii Supreme Court, and should be considered here.

REASONS FOR GRANTING THE WRIT

The right of transferability of water, from wet places where it is of little significance in a modern society to arable lands where it can be used for the irrigation of sugar or other crops, or for industry or

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and the Admission Act of 1959, when read together with 43 U.S.C. § 661 and the interpretations of that section by the Supreme Court of the United States, make clear that the vested rights and customs long recognized in Hawaii at the time of its annexation by the United States are recognized by Federal law, and the decision of this Court contravening such Federal statutes raises a substantial Federal question."

[19] Levinson, J., on rehearing, dissenting, 55 Haw. 297-298, App. pp. 151-152: "In view of the wholly unexpected nature of the court's holdings in *McBryde I*, the parties of course could not have been expected to raise their constitutional claims as part of their appeals from the decision of the trial court. Since the parties asserted constitutional grounds for the reversal of *McBryde I* at the first possible instance—in their petitions for rehearing—their arguments in this respect are properly before the court, *cf. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930), and therefore I consider myself bound to discuss them here."

[20] The Order of June 18, 1973, App. p. 108, calling for further briefing did not include the federal constitutional and other federal issues raised by the petitions of the parties for rehearing. Oral argument on rehearing was restricted to the two issues as to which further briefing was required by that Order. (No record reference is possible due to the lower court's Order Denying Motion, App. p. 113, denying the Motion to Have Official Reporter Present at Oral Argument, App. p. 111.)

municipal purposes, has been the key to the transformation of Hawaii's economy from a monarchy based upon subsistence farming to a modern society with highly mechanized agricultural operations on vast areas of formerly arid land irrigated with water transported from very wet valleys as much as thirty miles removed from the agricultural areas.[21] The right to transfer water away from the taro land sources to which originally appurtenant to other lands is necessary to continuation of irrigated agriculture in Hawaii.

The lower court's decision, made by a bare majority of that court,[22] decided matters not brought before that court on appeal,[23] in the face of the serious federal constitutional questions relating to that decision raised in the petitions for rehearing of Petitioners and other parties below, as to which issues the lower court would allow no oral argument, in the face of the vigorous dissenting opinions of Justices Marumoto and Levinson,[24] and involving "a retroactive alteration of state law such as would constitute an unconstitutional taking of private property",[25] without any consideration by the majority of the lower court of the federal constitu-

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[21] See Appendix 1 of Record Doc. No. 65.

[22] Chief Justice Richardson, Justice Abe (now retired), and Circuit Judge Ogata (appointed by the Chief Justice to sit on this case in the place of Justice Kobayashi, disqualified).

[23] Rule 3 of the Rules of Supreme Court of Hawaii requires each appellant to state the questions presented for decision, and the points of alleged error relied on. The changes in the water law of Hawaii announced by the court were not presented for decision by any party, and were not included in the points of alleged error before the court.

[24] Which in themselves illuminate the seriousness of the federal questions involved. See Louisville & Nashville R. Co. v. Melton, 218 U.S. 36, 49 (1910).

[25] Stewart, J., dissenting, Bonelli Cattle Co. v. Arizona, — U.S. —, 38 L.Ed.2d 526, 545 (1973).

tional issues raised, calls for this Court's exercise of its power of review. The issues involved vitally affect the economy of Hawaii [26] and will have substantial effect on the nation as a whole.[27] The lower court's decision was made in a way which has been demonstrated not to be in accord with the decisions of this Court [28] and in a manner which has so far departed from the accepted and usual course of judicial proceedings on issues raising questions of federal constitutional law as to deprive Petitioners of the fair hearing that procedural due process demands and to justify exercise by this Court of its power of review.[29]

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[26] Hawaii's 1972 crop of sugar alone created over $200,000,000 in income. Sugar is cultivated on 232,000 acres of land in Hawaii, of which about one-half, producing two-third the sugar crop, is irrigated. Over 10,000 year-around employees in the sugar industry have a pay roll of over $80,000,000 annually. Sugar Manual 1973, Hawaiian Sugar Planters' Association, pp. 3-4. Affidavit of Cushing, Record Doc. No. 56. Hawaii's pineapple crop generated $140,000,000 with 7200 employees and other diversified agriculture in Hawaii generated $80,000,000 with 7200 employees in 1972. First Hawaiian Bank, Hawaii in 1973, pp. 10, 13, 44 (1973).

[27] Hawaii produces nearly 10% of the nation's sugar consumption, and approximately 18% of domestic production. U.S. Dept. of Agriculture, Sugar Report No. 260, p. 16 (1974).

[28] See Levinson, J., dissenting, 55 Haw. at 297-303, App. pp. 151-157.

[29] "The due process clause of the fourteenth amendment to the Federal Constitution and article I, sections 4 and 18 of the State Constitution forbid the State from taking private property without just compensation. This prohibition speaks to all instrumentalities of state government equally, restraining the courts from engineering unconstitutional takings no less than the legislature. *See Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U.S. 226, 241 (1897). *See generally Shelley* v. *Kraemer*, 334 U.S. 1, 14-15 (1948), and cases cited therein." Levinson, J., dissenting, 55 Haw. at 298, App. p. 152.

"For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by

Further, if the bold and "revolutionary" taking "engineered" [30] by the highest court of Hawaii to turn over to the State of Hawaii water rights always theretofore recognized as privately owned be allowed to stand unreversed, the courts of this and other states will be encouraged to expropriate private property of other owners without compensation by the means used in this case by the court below—a judicial declaration that the privately owned rights never existed—rather than by eminent domain.

While the foregoing language in any other case might appear to be too strong, in this case:

1. The lower court has decided issues adversely affecting Petitioners that were not raised in the trial court, or on appeal, without prior claim or notice by the State and without hearing or argument on a record related to such issues.

2. The lower court deprived Petitioners of due process by denying them the opportunity to show that the State of Hawaii was bound by equitable estoppel to respect Petitioners' rights to continued severability and transferability of their water rights, in reliance on which Petitioners and others have invested moneys

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the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court." Stewart, J., concurring, Hughes v. Washington, 389 U.S. 290, 296-7 (1967).

"If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction." Brandeis, J., Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 679 (1930).

[30] Both characterizations are those of Justice Levinson.

and ordered their existence. That the State can be so bound is well established under State law.[31]

3. The lower court has divested vested property rights[32] by a sudden, unexpected decision, entirely unpredictable in light of the long-established judicial precedent relating to property rights in water in Hawaii,[33] which judicial precedent has been given legislative sanction[34] and governmental recognition.[35]

4. The lower court has failed to consider the question of whether water rights recognized by Hawaiian custom, laws and the decisions of Hawaii courts are protected by federal law embodied in 43 U.S.C. § 661.[36]

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[31] Yamada v. Natural Disaster Claims Commission, 54 Haw. 621, 513 P.2d 1001 (1973); Waianae Model Neighborhood Area Association, Inc. v. City & County of Honolulu, 55 Haw. 40, 514 P.2d 861 (1973); In re Title of Kioloku, 25 Haw. 357 (1920); and see Jover v. Insular Government, 221 U.S. 623, 633 (1911).

[32] The rights of property in water involved here have become "rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves" (Helvering v. Hallock, 309 U.S. 106, 119 (1940)), the deprivation of which cannot be had without compliance with due process requirements. See Marumoto, J., dissenting, 54 Haw. at 207-208, App. pp. 99-100.

[33] Some of the prior Hawaiian precedent establishing the right of transferability is discussed in Justice Levinson's dissent, 55 Haw. 294-297, App. pp. 148-151.

[34] As a result of a legislative commission set up in 1915 to analyze Hawaii underground and surface waters and to recommend necessary legislation, if any. See the analysis thereof by Levinson, J., dissenting, 55 Haw. at 275-277, App. pp. 129-131.

[35] See 55 Haw. at 277-280, App. pp. 131-134.

[36] While the provisions of 43 U.S.C. § 661 were not directly made applicable to Hawaii at the time of annexation, since both the Joint Resolution of Congress of 1898 (Public Resolution No. 51, 55th Congress, 2nd Session) and the Organic Act (Act of April 30,

If the appurtenant rights of the Petitioners, which resulted from long user, are protected by the statute, it is clear that the federal protection also extends to transportability onto other lands.[37]

The decision of the lower court has thus, retroactively, taken for the State Petitioners' property rights without a hearing. The property rights taken are obviously of great value, and the decision will affect adversely many people whose situation is the same as the Petitioners, as well as the sugar industry of Hawaii on which the nation substantially depends. The decision expropriates property rights without compensation and contrary to the Due Process Clause of the Fourteenth Amendment. The question of the constitutional propriety of the taking is substantial. The Petitioners raised the constitutional and other federal questions at the earliest opportunity. For all the reasons given and because Petitioners will have no other recourse, this Court should exercise its power of review.

1900, 31 Stat. 141) excepted Hawaii from the existing public land laws of the United States, as was declared in Broder v. Natoma Water & Mining Co., 101 U.S. 274 (1879), the provisions of 43 U.S.C. § 661 were "rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continuing use, than the establishment of a new one". Thus, the Court held, it was the vesting of the rights that gave rise to the later statutory protection under 43 U.S.C. § 661, *a fortiori* the application of the statute is not necessary to the vesting itself. As a result, rights to the severance and transfer of water from the lands to which originally appurtenant, which vested and accrued by the local customs, laws and the decisions of courts of Hawaii, may be entitled to federal protection as an independent matter of federal law.

[37] Hunter v. United States, 388 F.2d 148 (CA 9th, 1967).

CONCLUSION

The petition for a writ of certiorari should be granted.

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73-1440
73-1441
Nos. 73- , 73- and 73-
73-1442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

McBRYDE SUGAR COMPANY, LIMITED, AND OLOKELE SUGAR COMPANY, LIMITED, *Appellants*,

v.

STATE OF HAWAII, ET AL., *Appellees*.

SELWYN A. ROBINSON, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

IDA ALBARADO, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

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JOINT APPENDIX TO JURISDICTIONAL STATEMENT AND PETITIONS FOR WRITS OF CERTIORARI

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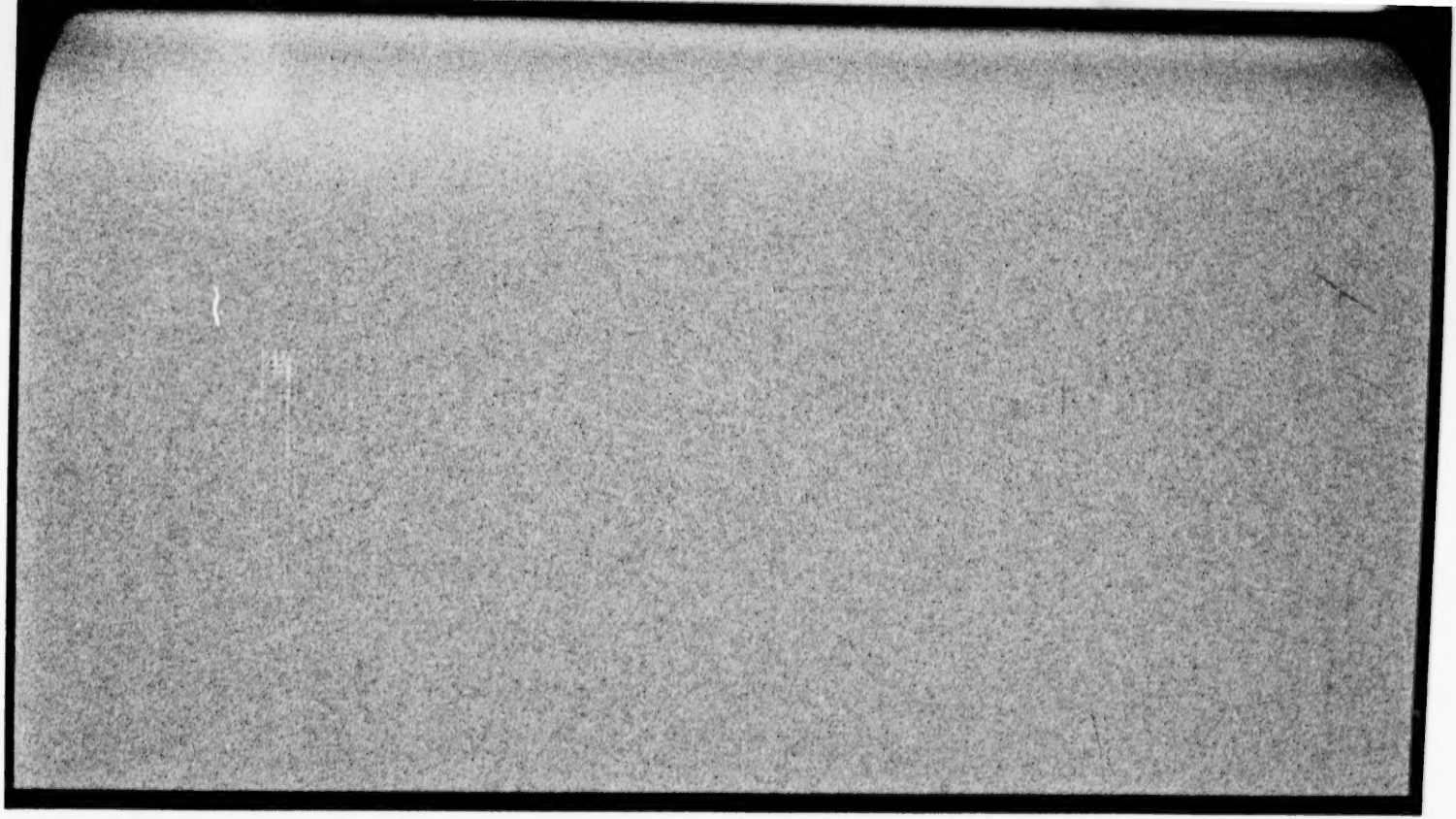

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Decision as Amended

S. P. No. 108

In the Circuit Court of the Fifth Circuit
State of Hawaii

At Chambers

McBryde Sugar Company, Limited,
Plaintiff,

vs.

Aylmer F. Robinson, et al.,
Defendants.

Action To Determine Water Rights

DECISION

Jurisdiction and Pleadings

This is a civil action for the determination of water rights. The land and water rights, the subject of this litigation, are situated on the island of Kauai within the jurisdiction of this Court. Jurisdiction is vested in the judge of the Fifth Circuit Court sitting as commissioner of private ways and water rights under Part III of Chapter 234, to wit, Sections 234-30 through 234-36, R.L. Hawaii 1955.

The complaint was filed by McBryde Sugar Company, Limited (hereinafter called "McBryde") March 24, 1959 and amended April 22, 1960. Answers were filed by the State of Hawaii (hereinafter called "the

State"), Kiyoshi Kimata, Toshio Komaki, Marcellino Francisco, Hideo Nonaka, Yuji Shimomura, Junichi Kano, Chee Kung Fui Society, Gay and Robinson and the individual partners (hereinafter called "G&R") and Olokele Sugar Co., Ltd. On September 13, 1963 default was entered as to all persons who had not appeared. The devisees of Alice Robinson and Sinclair Robinson were substituted as parties (Probate Nos. 1880 and 1991, 5th Cir. Ct.).

This is a water commissioner proceeding, and the pleadings filed herein are suffcient for adjudication of rights between all parties, without need for formal cross-pleadings between the several defendants.

History of Prior Litigation

In 1927 the Territory of Hawaii brought action in the First Circuit Court against G&R, Hawaiian Sugar Company (hereinafter called "HS Co."), McBryde and the other owners of land in Hanapepe. Since it was brought in the wrong circuit it was dismissed with leave to bring it in the proper court. *Territory v. Gay,* Eq. 2856, 32 Haw. 404.

While that action was pending in the trial court the Territory brought a second action in the First Circuit Court, in which G&R and HS Co. were the sole respondents. This was tried on the merits before Cristy, J., to determine the ownership of the surplus flow and whether the Territory was entitled to an injunction against the maintenance of the dams. *Territory v. Gay,* Eq. 2911, 31 Haw. 376, 52 F. 2d 356, cert. denied 284 U. S. 677.

The gist of the above proceeding challenged the right of G&R to maintain the dams and the ownership in the surplus waters. There was left open the rights of the several owners of the lower valley entitled to water. The decision of Judge Cristy adjudicated the rights to "normal surplus" water between the State and G&R and contained 21 findings of fact (Exh. M-J-6, pp. 45-73). These findings are *res judicata* between the State and G&R.

On appeal of the above entitled case the Supreme Court of Hawaii affirmed the judgment below. The court was divided on the question whether there was any distinction between "storm surplus" and "normal surplus" and divided on the question whether the rule laid down in *Carter v. Territory,* 24 Haw. 47, should be overruled. Chief Justice Perry could see no distinction, in history, in principle, or in law between surface waters of the normal flow and surface waters which come in freshets as a result of storms, and felt that the *Carter* case, to the extent that it decides that storm surplus should be governed by the common-law riparian doctrine should be overruled. Parsons, J., was of the opinion that storm surplus was not in issue and accordingly the rule laid down in the *Carter* case should not be disturbed. Banks, J., while agreeing with the Chief Justice that the ownership of all surface waters, whether it be normal or storm, should be governed by the same rule, concluded that the rule announced in the *Carter* case is not inconsistent with preceding decisions of our supreme court, and the common-law riparian doctrine should be applied to normal as well as to storm surplus waters.

Issues

The first phase of the trial was concerned with the determination of which lands owned by the respective parties were ancient taro lands or lands having ancient appurtenant water rights. The next phase of the trial involved the question of rights by adverse user or by prescription. On this issue, both McBryde and G&R agreed that rights by prescription or adverse user could not be had against the State, but that the State could acquire such rights against others. The final phase of the trial dealt with the question of water duty.

Findings of Fact

General Background

1. The watershed of the Hanapepe River is about fifteen miles long and from two to five miles in width. At the upper or north portion the annual rainfall is between 400 and 500 inches. The annual rainfall decreases as the valley goes toward the sea, and at the sea the rainfall is comparatively negligible. The Koula stream joins the Manuahi stream about half way to the sea to form the Hanapepe River.

[*Territory v. Gay*, 52 F. 2d 356, 357 (9th Cir. 1931), Map Exh. G&R-F-42, Rainfall charts Exh. M-E-16]

2. The Ahupuaa of Hanapepe, on the island of Kauai, formerly a crown land, is now one of the public lands of the State of Hawaii.

[Exh. M-J-6: Finding No. 1 of Chisty, J., Eq. 2911, p. 49]

3. The ilis kupono of Manuahi and Koula, owned by defendants G & R, adjoin each other and together exclusively occupy all of the area of land comprising the northerly and mountainous region within the boundaries of the mauka portion of the ahupuaa of Hanapepe. Those ilis comprise the entire watershed and source of supply of all waters which would, if not diverted, find their way into the Hanapepe River makai of the junction of the Manuahi and Koula streams at the southerly boundary of those ilis.

[Exh. M-J-6: Findings Nos. 3 and 5 of Cristy, J., Eq. 2911, p. 50; Pretrial Order par. 5a, S. P. 108, 5th Cir. Ct.]

4. The ilis of Eleele and Kuiloa are ilis kupono, and are owned by McBryde; the State is the owner of the ahupuaa of Hanapepe; and the other lands within the outer boundaries of the ahupuaa of Hanapepe having water rights from the Hanapepe stream, are as set forth in Court's Exhibit "1" attached hereto and made a part hereof.

[Pre-trial Order, par. 5a, S. P. 108]

5. G&R owns kuleanas designated LCA 10458 to Alaiki, LCA 8035 to Alaiki, LCA 10457 to Namoki, all within the boundaries of Koula and LCA 9654 to Koikoi within the boundaries of Manuahi.

[Exh. G&R-C-1 through C-4]

Except for possible recurrent slight use on said bottom land for wet agriculture, the water arising in Manuahi Valley in the ili of Manuahi is not diverted, but flows out of the ili into the Hanapepe River near

the southerly boundary of the ili at the junction of the Koula Stream.

[Exh. M-J-6: Finding No. 7 of Cristy, J., p. 51]

River Flow

6. "Total water available" as used in these findings means the amount of water that would flow through the Hanapepe River if no diversions at all were made. For the period 1934-48, the total water available may be determined by adding the amount of water flowing in the river at the junctions of Koula and Manuahi streams to the amount of water in the Koula Ditch, both of which figures are reported in the USGS Water Supply Papers.

[USGS—Water Supply Papers, Exh. M-D-12 through M-D-33]

7. The mean total water available in the years 1934-48 was 78,400,000 gallons per day.

[Exh. M-D-18 through M-D-33]

8. The maximum flow reported in the Hanapepe River below the Koula-Manuahi junction is 25,200,000,000 gallons per day on April 15, 1963.

[Exh. M-D-46, p. 18 notes]

9. Total water available is 32 million gallons per day or less ten per cent of the time. Total water available is 145 million gallons or more per day another ten per cent of the time. During the remaining eighty per cent of the time, the total water available is between 32 million and 145 million gallons per day.

[Exh. G&R-I-12, Curve B]

10. During the ten per cent of the time in the years 1934-1949, when total water available was 32 million gallons per day or less, the flow in the river below the junction of Koula and Manuahi streams was 11 million gallons per day or less. The difference of 21 million gallons per day was diverted by the old Koula ditch, which was the only diversion above the junction.

[Exh. G&R-I-12 comparison of Curves B and A; Exh. M-D-59]

The Dam, HS Co. Lease, Etc.

11. On October 24, 1889 G&R leased to W. R. Watson certain described premises (high table lands) in Makaweli and Hanapepe and agreed to give to the lessee the right to "take and use all the water in and of the Koula and Hanapepe and Makaweli rivers for irrigating cane and for fluming, and for mill and Plantation purposes, but only for the demised premises . . .", provided that a portion of the water taken was delivered free to G&R.

[Exh. G&R-M-1(b)]

12. On November 4, 1889 W. R. Watson assigned the lease to HS Co.

[Exh. G&R-M-3(b)]

13. Pursuant to its rights under the Watson lease and water agreement, HS Co. built dams and a system of ditches and flumes to take water from the Koula stream and certain tributaries and deliver it outside the Hanapepe Valley to the lands leased by it from

G&R for HS Co.'s use and to G&R for their use. This was completed in 1891.

[Exh. M-J-6: Finding No. 13, Cristy, J., Eq. 2911, 1st Cir. Ct.; Exh. G&R-M-1(b); Exh. G&R-E-1891; Exh. G&R-F-8]

14. A portion of the water arising in the Koula Valley from a watershed lying within part of the ili of Manuahi and the remainder within the ili of Koula is impounded by dams, approximately five feet high, across the two main tributaries of the Koula stream, together with a lesser dam and a series of flume catchments under the falls on other tributaries of the Koula stream in the same vicinity (hereinafter collectively called "the dams") about three miles north of the southerly boundary of the ili of Koula and situated wholly within the ili of Koula.

[Exh. M-J-6: Finding No. 8, Cristy, J., Eq. 2911, 1st Cir. Ct., p. 51; View of area]

15. A portion of the water impounded by the dams and collected by the flume collection system built by HS Co. was until March 30, 1949 diverted from the watershed of the Hanapepe River by means of a system of ditches, piping and flumes, originally consisting of 1,017 feet of tunneling, 16,100 feet of ditching, 12,300 feet of fluming, and 5,570 feet of 40-inch piping from the head dam to the point of crossing out of the Hanapepe Valley, a distance of 6¾ miles. Of the ditching, about two miles were orignally cut through solid rock, the rest in rotten rock and earth. This ditch, flume, tunnel and pipe water diversion system was generally known as the "Hanapepe

ditch," though called the "Koula ditch" by G&R, and was physically situated inside the palis and along the course of the Koula Stream and Hanapepe River from the head dam to its point of crossing out of the Hanapepe Valley through the makai siphon located immediately down stream from L.C.Aw. 9265 to Kipani.

[Exh. G&R-F-8; Exh. G&R-E-1891; Exh. M-C-7; Exh. M-D-57; Test., R. H. Cox]

16. The development of the Koula water by HS Co. with the assistance of G&R, was begun and maintained openly under a claim of right and title to such waters, over and above prescriptive rights, by reason of the ownership by G&R of fee simple title to the area comprising the watershed.

[Exh. M-J-6: Finding No. 17, Cristy, J.]

17. The development of the diversion of waters, as continuously maintained in Koula Valley, was the result of very substantial capital expenditure on the part of both G&R and HS Co.; that the development of water supply was a necessary condition precedent to creating this sugar plantation; and that the government has continually collected taxes from G&R and HS Co. on the basis of the enhancement of values of their holdings attributable substantially to the development and use of irrigation from the Koula Dams.

[Exh. M-J-6: Finding No. 20, Cristy, J.]

18. The diversion system built by HS Co. leaked substantial amounts of water from shortly after its construction to the time of discontinuance of its use

by G&R on March 30, 1949. Much of that leakage found its way back into the Koula Stream and Hanapepe River.

[Test., Ah Yet Dang; Exh. M-J-20, pp. 19, 36; Exh. M-C-7; Exh. M-D-57; Test., C. Christopher; Test., Doak Cox; Exh. M-K-56, p. 1; Exh. G&R-E-1910, pp. 7-8; Exh. G&R-E-1914, p. 9; Exh. G&R-E-1925, p. 16; Exh. G&R-E-1930, p. 5; Exh. G&R-E-1932, p. 4]

19. The proportion of the Hanapepe Ditch waters which G&R were entitled to receive free under G&R's agreement with HS Co. was to be determined by the ratio between the G&R and the HS Co. sugar cane lands.

[Exh. G&R-M-1(b); Exh. G&R-M-5(b); Test., Aylmer Robinson, August 3, 1965]

20. (a) Prior to December 31, 1938 G&R were entitled to receive as their share slighly less than one-third of the waters delivered by the Hanapepe Ditch into Makaweli; (b) Between January 1, 1939 and December 31, 1941 G&R were entitled to receive as their share slightly more than one-third of the waters delivered by the Hanapepe Ditch into Makaweli.

[Exh. G&R-M-1(b); Exh. G&R-M-5(b), and:
(a) Exh. G&R-E-1937, pp. 5, 7;
(b) Exh. G&R-E-1939, pp. 6, 8]

21. After December 31, 1941, G&R operated and controlled the Hanapepe Ditch, and leased land and water to Olokele Sugar Company, Limited, retaining

to itself 43% of that water; such lease providing that in case the water of the Koula Ditch was reduced as a "result of litigation", an alternate supply would be developed by G&R for use by Olokele.

[Exh. M-I-27, pp. 25, 28]

22. By the agreement entered into on February 21, 1930, a substantial revision was made with respect to control and ownership of the waters in the Koula stream below the dams.

[Exh. G&R-M-24]

23. All waters in the Koula stream below the dams, however arising (whether from springs, rainfall, tributary streams, water never impounded by the dams, or water returning to the stream through seepage or leakage from the Hanapepe Ditch), were an indistinguishable part of the flow of that stream. Such waters, to the extent that the same were claimed by G&R to be normal daily surplus, were under the control and ownership of G&R; and any right that HS Co. may have had prior to February 21, 1930 to terminate such control and ownership by taking such waters below the dam for use upon the premises leased to them at Makaweli was relinquished to G&R on that date.

[Exh. G&R-M-24]

24. The practical effect of the agreement of February 21, 1930 was a relinquishment by HS Co. of its right to terminate G & R's control and ownership over any waters flowing in the Koula stream below the dam, since G&R was acknowledged to have the

right to develop any of such waters flowing in the Koula stream below the dam.

[Exh. G&R-M-24]

25. G&R's lease and water agreement with HS Co. (the Watson lease) expired by its terms on December 31, 1938.

[Exh. G&R-M-1(b)]

26. On June 17, 1937, substantial amendments and changes were made in the terms of the Watson lease, and the lease was extended for an additional two-year term from the expiration of the original term thereof.

[Exh. G&R-M-25; G&R-E-1937, pp. 10, 11]

27. On March 3, 1939 the Watson lease was further extended for one year from the expiration of the first extension thereof.

[Exh. G&R-B-3]

28. The HS Co. lease (Watson lease) was extended unto December 31, 1941 (Exh. G&R-M-25, and G&R-B-3 and G&R-B-4). In 1941 G&R assumed control and operation of the ditches and flumes of the old Koula Ditch and of the dams.

29. The old Koula Ditch as built and operated by HS Co. passed along the west side of Koula Valley, then crossed to the east side, where it passed through lands belonging to G&R and lands belonging to the Territory lying to the east of Hanapepe Valley, to a point where it was siphoned across Hanapepe Valley to Government lands lying to the west of the valley, and then entered Makaweli a short distance east of Hanonui Valley.

G&R's Diversions

30. From 1945 through 1949 G&R and Olokele realigned stretches of the old Koula Ditch so as to eliminate all portions lying on lands belonging to others than G&R, some of which were leaky and deteriorated. The realigned ditch consists of 1) an upper stretch which was the upper part of the old Koula ditch; 2) a new middle stretch, consisting principally of a tunnel through the ridge between Manuahi and Koula, a siphon across Manuahi, and a tunnel through the hills to the southwest of Manuahi, and 3) a lower stretch, which was the lower portion of the old Koula ditch on Makaweli. The new system of tunnels, sometimes referred to as the "Hanonui tunnel system", runs solely along and through the lands of G&R. On March 28, 1949, G&R opened for use this new Hanonui tunnel system for diversion and delivery to its land at Makaweli (in part leased to Olokele Sugar Company) of waters of the Koula and Manuahi streams and their tributaries impounded by its dams in Koula.

31. The old Koula ditch could and did carry at least 40,000,000 gallons per day (gpd). The realigned Koula Ditch has a capacity of 65,000,000 gpd (Exh. M-D-56). Since the dams which divert water into it are the same identical dams which fed the old Koula ditch, the greater capacity of the new ditch effects an increase in the amount it actually carries only at times of high water.

32. Since the opening for use of G&R's Hanonui tunnel system on March 28, 1949, the amount of water

effectively taken by G&R from the Hanapepe River and its tributaries has been substantially increased, and McBryde has been unable to take from the stream the amounts of water which it had taken continuously under an alleged claim of right for the measured period January 1, 1934 through March 30, 1949.

33. The County of Kauai diverts an average of about 225,000 gpd from the Hanapepe River at its water works about 1200 yards below the Koula-Manuahi junction.

34. Major ancient ditch systems which are still partly in use in the lower part of Hanapepe Valley are (reading from mauka to makai according to the position of the intake from the Hanapepe River):

(a) The Keana-a Ditch, sometimes called Keahi Ditch, on the east or Wahiawa side of the river;

(b) The Kaauwaikahi or Auwaikahi Ditch on the west or Makaweli side of the river; and

(c) The Kapili Ditch on the east side of the river.

For many years McBryde has been one of the persons taking water from the Keana-a, Kaauwaikahi and Kapili ditches.

35. In 1959, McBryde made substantial changes in these ditches. It enlarged and realigned the Keana-a Ditch and built a new dam and intake for it somewhat makai of its old dam and intake. This enlarged and realigned Keana-a Ditch is now known as the "Hanapepe Intake Ditch". It also built a ditch and siphon across the river, known as the "Farmers' Ditch", which feeds water from the Hanapepe Intake Ditch

into the Kaauwaikahi Ditch. The Kapili Ditch is also connected to the Hanapepe Intake Ditch.

36. McBryde constructed and maintained three pumps in the Hanapepe Valley on the east side of the river, known as Pumps 1, 2 and 3, the numbers running from makai to mauka.

The present diversion dams across the river and its tributaries, reading from mauka to makai, are:

(a) G&R's dams in Koula referred to above, built in or before 1900.

(b) McBryde's Hanapepe Intake Ditch dam, built in 1959. This dam diverts all the water which reaches it when the flow of water reaching it is 50,000,000 to 60,000,000 gpd or less.

(c) McBryde's Pump 2 dam, built before 1934. It diverts whatever water reaches it in dry weather.

(d) McBryde's Pump 1 dam, built about 1900. A road crosses the river on top of this dam, which is sometimes referred to as the "Kailiili Crossing". It diverts whatever water reaches it in dry weather. Below this dam the river is tidal and its surface is at sea level.

[Exh. M-D-58]

37. On June 29, 1965, the day on which this Court visited Koula, the "total water available" was 66,800,000 gallons, of which 44,200,000 flowed in G&R's realigned Koula Ditch and 22,600,000 in the river at the Koula-Manuahi junction. (Test., Russell Smith, July 20). Only a relatively small quantity was passing over the Koula dams (View by Court; Exh. G&R-K-28), from which the Court concludes

that the Koula dams divert whatever water reaches them up to about 30,000,000 to 40,000,000 gpd, the exact amount depending on whether the flow reaches them at an even rate throughout the day or not. For instance, the total diversion in one day would be greater if the water reached the dams at an even rate of 2,000,000 gallons per hour (equivalent to 48,000,000 gpd) for twenty-four hours than if the same total amount of water reached them at 1,000,000 gallons per hour (equivalent to 24,000,000 gpd) for twelve hours and 3,000,000 gallons per hour (equivalent to 72,000,000 gpd) for the next twelve hours.

38. On November 11, 1964, total water available was 115,500,000 gallons, of which 45,500,000 flowed in G&R's realigned Koula Ditch, and 70,000,000 in the river at the Koula-Manuahi junction. A comparison with the figures for June 29, 1965, shows that the difference in the amount of water diverted into the ditch was 1,300,000 gallons, or 2.7% of the 48,700,000 difference in total water available. The Court, therefore, concludes that when the water reaching the Koula dams rises above them, they divert about 2.7% of the additional water into the realigned Koula Ditch.

39. The total water carried by the realigned Koula Ditch is limited by its capacity of 65,000,000 gpd. The Court, therefore, concludes that the realigned Koula Ditch diverts the first 30,000,000 to 40,000,000 gpd that reach the Koula dams, plus 2.7% of any additional water that reaches them, up to a total diversion of 65,000,000 gpd.

40. McBryde's Pumps 1, 2 and 3 pump water up the east pali of Hanapepe Valley to McBryde's lands lying as far away as Lawai.

[Test., R. C. Cox, July 1-2, 1965; Exh. M-D-58]

41. McBryde's Pumps 2 and 3 pump water which comes from the Hanapepe River via the Hanapepe Intake Ditch. McBryde's Pumps 1 and 2 have intakes directly from the Hanapepe River.

[Exh. M-D-58]

42. McBryde's pumps are connected with underground tunnels as well as the river (Exh. G&R-F-49). As originally built, these tunnels drew water from the alluvial soil and gravel in the bottom of Hanapepe Valley, which probably reduced the flow in the river to some extent. However, in about 1930, the extension of these tunnels into the "country rock" to the east of Hanapepe Valley struck a lava tube which supplies a large proportion of the water which is pumped by pumps 1, 2 and 3.

[Test., R. C. Cox, Doak Cox; Exh. G&R-F-49]

43. Because the "country rock" is hard and relatively impervious, very little, if any, of the water in the lava tube would naturally reach the Hanapepe River. After the tapping of the lava tube, McBryde's tunnels were sealed so that they draw water only from the lava tube, and not from the alluvial fill of the valley.

[Test., R. C. Cox, Doak Cox; Exh. G&R-F-49]

44. In addition to the water which it takes from the Hanapepe Intake Ditch through Pumps 2 and 3, McBryde takes water from the Hanapepe Intake

Ditch, both directly, and through the Farmers' Ditch and Kaauwaikahi Ditch, to irrigate its sugar lands in Hanapepe Valley.

[Test., R. C. Cox]

45. Certain farmers take water from the Hanapepe Intake Ditch and the Kaauwaikahi Ditch to irrigate their lands for taro and other crops. Certain of these lands are owned by the State and G&R.

46. In the years 1934-1959, the water supply system in the lower Hanapepe Valley was generally the same as the present system described above, except that the Keana-a and Kapili ditches were used instead of the Hanapepe Intake Ditch, and Kaauwaikahi Ditch drew its water directly from the Hanapepe River.

47. There is no evidence of the respective quantities of water drawn by McBryde and the farmers for use in Hanapepe Valley, either before or after 1959.

48. The fact that McBryde was taking waters from Hanapepe stream for use in part on its plantation outside Hanapepe Valley was a matter of common knowledge in the community during the measured period, 1934-March, 1949.

49. Over the measured period 1934-March, 1949, McBryde took waters daily from Hanapepe stream.

[Exh. M-E-9]

50. McBryde's takings of water varied with the needs of its plantation, more water being taken in the drier summer months than in the wetter winter months.

[Exh. M-E-14]

51. Actual notice of McBryde's claim of ownership of water was given to G&R by the service of McBryde's Crossbill in Eq. 2856 on G&R in 1927.

[Exh. M-J-2]

52. In 1927, in its Petition for Perpetuation of Testimony (S. P. 23, Fifth Circuit Court) G&R admitted that McBryde claimed an interest in the normal surplus-waters of Koula and Manuahi antagonistic to the claim of ownership and right of possession, control and use of said waters by G&R.

[Exh. G&R-G-3, petition, par. IV]

53. Actual notice of McBryde's claim of ownership by prescription of all the water it was then and had been taking was again given on June 8, 1938 and again on June 30, 1938 by the delivery to G&R's attorney of letters from the attorney for McBryde, which letters were received a few days after their respective dates by G&R.

[Exh. M-M-4, June 8, 1938 attachment; Exh. M-M-5; Test., Aylmer Robinson, August 2, 1965]

54. McBryde claimed to be the alleged owner of and entitled to take all the waters it actually took over the measured period 1934-March, 1949.

[Exh. M-J-2; Exh. M-M-4, June 8, 1938 attachment; Exh. M-M-5]

Diversions 1934 through 1949

55. Daily records of diversions from the river by G&R and McBryde were introduced in evidence for the years 1934-1948, and January-March 1949.

[Exh. M-D-18 through 34 and M-E-9]

These diversions were summarized in graphs known as "duration discharge curves" showing the amounts of water available and the amounts diverted during each percentage of the period 1934–March, 1949. These curves show that during the percentage of this period of time shown in column (a) below, flow and diversions were at least the figure shown opposite that percentage in the other columns.

Percentage	Total Water Available	Koula Ditch	River USGS	McBryde	Total Diversions
(a)	(b)	(c)	(d)	(e)	(f)
100	20	15.5	4.5	2.0	17.5
95	29.5	19.5	10	8.6	28.1
90	32	21	11	10.0	31
80	36	22	14	12.3	34.3
70	40.5	24	16.5	14.7	38.7
60	45	25	20	17.0	42.0
50	50	25	25	19.6	44.6
40	60	27.5	32.5	22.0	49.5
30	70	26.5	43.5	25.0	51.5
20	85	20	65	28.3	48.3
10	145	30	115	33.0	63.0
	G&R-I-12 Curve B	Column (b)-(d)	G&R-I-12 Curve A	M-E-1(a)	Column (c)+(e)

For example, total water available was at least 45 million gallons per day (mgd) 60% of the time. The figures for 100% of the time are close approximations for McBryde's and G&R's ditches were shut down on a very few days in this period.

Column (c) shows the amount of water in the river at the USGS gauge below the Koula-Mannahi junction, and represents the total water available after the Hawaiian Sugar Co.-G&R diversions.

Comparison of the above figures, and the duration discharge curves from which they are read, reveals that during the 30% of the time when the total water available was 70 mgd or less, McBryde's diversions took nearly all the water left in the river after the Koula ditch diversions. Thus, during this 30% of the time, the Koula ditch diversions effectively limited the amount McBryde was able to take. During the remaining 70% of the time, total water available was sufficient to satisfy the diversions of G&R and McBryde, with a substantial quantity left over.

It is evident that in times of low water during 1934-49, HS Co., and later G&R, diverted a substantial quantity of water thereby cutting the water available to McBryde to less than 7 mgd. Evidence of five such periods in the years 1934-49 was pointed out. (G&R-I-18 through I-22)

	McBryde Diversion	
Date	Exh. M-E-9	Exh. G&R-I-18 through I-22
June 11-18, 1935	10.5- 6.5 mgd	9.5- 9.7 mgd
June 9-16, 1936	10.5- 7.5 mgd	9.5- 8.6 mgd
September 29-October 5, 1939	9.5- 7.0 mgd	9.5- 8.3 mgd
April 21-30, 1941	8.5-10.0 mgd	10.4- 9.6 mgd
March 3-7, 1942	10.0- 9.0 mgd	10.2- 7.7 mgd

Each of these five periods has the following characteristics, namely, that rainfall in the Makaweli and McBryde sugar plantation areas, as reported by the United States Department of Agriculture, always averaged less than half, and usually much less, of the rainfall to be expected in those places at that time of year on the basis of many years' records. (G&R-I-2

through I-3, I-5 through I-9, I-18 through I-22). This demonstrates that these were periods when the need was particularly pressing.

Lands Having Appurtenant Water Rights

56. The parties actively participating in the trial (McBryde, the State, and G&R) agreed on the areas of wet land entitled by appurtenant right to water for taro cultivation which are found within certain parcels of land in Hanapepe Valley and its tributaries. The Court finds these figures are correct. Under each party's name is listed the designation or description of the parcel of land, and the area of wet land in which the named party owns appurtenant water rights is set forth below.

McBryde Lands

Item No. (Exh. M-C-53(a))	Description	Ancient Taro Acreage
1	L.C.Aw. 10016 Apana 2 to Lono	0.65 acre
2	L.C.Aw. 9232 Apana 1 to Kaaaaoloa	0.58 acre
3	L.C.Aw. 7631 Apana 1 to Kelemoku (portion)	1.20 acres
4	L.C.Aw. 8182 to Heau	0.70 acre
5	L.C.Aw. 8254 Apana 1 to Haoleki	0.43 acre
6	Portion L.C.Aw. 8254 Apana 2 to Haoleki	0.53 acre
7	Portion L.C.Aw. 7321B to Kualeho	0.81 acre
8	L.C.Aw. 10922 to Ula	2.48 acres
9	L.C.Aw. 7922 to Kapaehaa	6.96 acres
11	Kam IV to Aihoi Apana 2	0.53

McBryde Lands

Item No. (Exh. M-C-53(a))	Description	Ancient Taro Acreage
12	L.C.Aw. 3284 Apana 1 to Wahineaea	1.30 acres
13 (Ili of Kuiloa)	L.C.Aw. 5572 Apana 3 to Kaaha	
	Section A	1.20 acres
	Section B	5.80 acres
	Section C	3.00 acres
14	L.C.Aw. 3284 Apana 4 to Wahineaea	1.13 acres
16	L.C.Aw. 9029 to Kaohulihau	0.91 acre
17	L.C.Aw. 8198 to Kamano	0.70 acre
18	L.C.Aw. 8036 to Aihoi	1.20 acres
19	L.C.Aw. 3284 Apana 3 to Wahineaea	1.95 acres
21 (Ili of Eleele)	L.C.Aw. 7712 Apana 5 to Kekuanaoa	
	Section G	6.71 acres
	Section H	4.53 acres
	Section I	2.13 acres
	Section K	2.32 acres
	Section R	0.90 acre
23	Und. Int. L.C.Aw. 5309 to Kanakamaikai	
	Und. Int. L.C.Aw. 5447 Apana 1 to Nuanua	
	Und. Int. L.C.Aw. 5447 Apana 3 to Nuanua	
	L.C.Aw. 7928 Apana 1 to Maluaikoo	11.03 acres
	L.C.Aw. 7928 Apana 2 to Maluaikoo	
	Und. Int. L.C.Aw. 9135 Apana 1 to Kalepona	
	L.C.Aw. 10010 to Makahiki	
	L.C.Aw. 10526 to Naloheelua	
	M. Aw. 19-B to Kanehiwa	
		59.68 acres

	State Lands Government Lot No.	Ancient Taro Acreage
Exh. No. 32(a)	4	1.10 acres
	5	3.00 acres
	6A	1.10 acres
	6B (Gr. 1149)	0.26 acre
	7	4.10 acres
	8	2.50 acres
	9	7.50 acres
	11	2.00 acres
	14	1.00 acre
	15	0.70 acre
	18	1.00 acre
	19	1.14 acres
	21	4.25 acres
	22	4.10 acres
Exh. No. 32(b)	24	5.60 acres
	25	2.20 acres
Exh. No. 32(c)	26	3.30 acres
	27	6.20 acres
	28	0.70 acre
	30	1.70 acres
	31	1.80 acres
	35	0.40 acre
	36	0.90 acre
Exh. No. 32(e)	39	3.50 acres
	40	1.30 acres
Exh. No. 32(f)	47	1.16 acres
	48	0.10 acre
	50	0.25 acre
Exh. No. 32(a)	54B Gr. 10832)	0.14 acre
	55 (SSA 54910)	0.41 acre
	LCA 9116:1	0.24 acre
		63.65 acres

G&R Lands

Designation	Wet Land Acreage
LCA 5447:3 to Nuanua	0.75 acre
LCA 7993:1 to Pala	0.79 acre
LCA 8020:1 to Asa Kapoi (G&R portion)	0.49 acre
LCA 8077:2 to Hii	1.21 acres
LCA 8123 to Holeka	0.47 acre
LCA 9135:1 to Kalepona	0.57 acre
LCA 9142:1 to Kapekue (G&R portion)	0.43 acre
LCA 9190:1 to Kupia (G&R portion)	1.70 acres
(G&R reserved water rights portion)	0.89 acre
LCA 9283:2 to Keliinui	0.56 acre
LCA 10069 to Maluihi	.0.80 acre
LCA 10274 to Palahe	0.83 acre
LCA 10312:1 to Namaielua	1.14 acres
LCA 11011 to Makaiku	1.00 acre
	11.63 acres

[Tr. pp. 1044-45 and 1062]

57. The three parties represented at the trial also agreed that the wet land areas of other private owners totaling 29.11 acres shown in Court's Exhibit "2" which is hereto attached and made a part hereof, and as shown in G&R Exhibit G-4 under the heading "*Exhibit E* Taro Land of Other Private Owners", are correct. The Court finds these figures are correct.

58. McBryde and G&R agreed and G&R's witness Roswell Towill testified that the area of wet lands with appurtenant water rights for taro belonging to G&R within certain parcels of land is as follows:

G&R Lands

Designation	Wet Land Acreage
LCA 3284:2 to Wahineaea	1.95 acres
LCA 5309 to Kanakamaikai	0.93 acre
LCA 5447:1 to Nuanua	0.32 acre
LCA 5447:2 to Nuanua	0.21 acre
LCA 6578:2 to Paele	1.39 acres
LCA 7919 to Kaiahauna	3.06 acres
LCA 8020:2 to Asa Kapoi (G&R portion)	0.63 acre
LCA 8077:3 to Hii	0.46 acre
LCA 9265 to Kipani	3.10 acres
LCA 10275 to Makaino	0.39 acre
LCA 10349 to Nakapa	3.93 acres
LCA 10678:1 to Pua	0.78 acre
LCA 11068 to Wailele	1.85 acres
	19.00 acres

While the State did not join in this agreement, it introduced no evidence to contradict these areas which the Court finds correct.

59. The evidence shows that there is a substantial area of wet land in Koula and Manuahi valleys having appurtenant water rights for the cultivation of taro. The only evidence giving the total acreage of this wet land is Findings of Fact No. 6 of Cristy, J. in *Territory v. Gay* (1st Cir.) Eq. 2911, which places the acreage at "approximately 90 acres." This finding was made in litigation between the predecessors in interest of the State and G&R, and was introduced in evidence in this proceeding by McBryde. There is no evidence tending to contradict it, and this Court adopts it as its finding.

60. [As amended R7-251-250] The remaining areas claimed by McBryde, and the State, as their wet lands having appurtenant water rights for taro cultivation, were disputed by G&R. For the sake of con-

sistency in the matter of the standard of proof required, and taking into consideration the probable standard of proof adopted by Judge Cristy for the determination of taro lands in formulating his Finding No. 6 in *Territory v. Gay* (1st Cir.) Eq. 2911, as shown in Finding No. "59" above, and also taking into consideration the standard fixed herein as being the right to water in the quantity which was customarily used on the land at and immediately before the date of the award or grant, the Court finds that the following disputed lands are wet land taro areas:

McBryde Lands

Item No. (Exh. M-C-53(a))	Description	Ancient Taro Acreage
13 (Ili of Kuiloa)	L.C.Aw. 5572 Apana 3 to Kaaha Section E	4.00 acres
15	Portion L.C.Aw. 10271 Apana 1 to Makailio	2.49 acres
20	L.C.Aw. 11011 Apana 1 to Palama	1.17 acres
21 (Ili of Eleele)	L.C.Aw. 7712 Apana 5 to Kekuanaoa Section J	8.33 acres
	Section L (portion)	4.68 acres
	Section M	4.30 acres
	Section N	6.22 acres
	Section O	5.99 acres
	Section P	0.47 acre
	Section Q	0.88 acre
		38.53 acres

State Lands

Government Lot 10	9.80 acres
Government Lot 12A	3.30 acres
Government Lot 13	2.00 acres
Government Lot 37	4.02 acres
Government Lot 45	0.50 acre
	19.62 acres

61. [As amended R7-249] There is not sufficient evidence to support a finding by this Court that any of the other disputed areas were cultivated in wet land taro at about the time of the Land Commission awards or Mahele.

In summary, the lands of the various parties entitled to appurtenant water rights are:

McBryde	98.21 acres
State	83.27 acres
G&R Koula & Manuahi	90.00 acres
Below Koula & Manuahi	30.63 acres
Others	29.11 acres
	331.22 acres

The figures set forth in above findings represent the Court's findings of the areas of wet taro land at and immediately before the time of the Land Commission Awards in Hanapepe, which occurred in the years 1851-1855. In arriving at these findings, the Court has found that the relevant evidence has varying degrees of probative value.

For the purpose of determining which lands were entitled to appurtenant water rights, McBryde, the State and G&R, through their expert witnesses, namely, surveyors for the respective parties, used the same guide lines. Differences of opinion were primarily on the weight to be given to each of these guide lines. The areas of dispute centered on the questions of whether the *auwais* shown on Government Registered Map, Exh. M-C-7, were ancient *auwais* as claimed by McBryde and the State, or new *auwais* as claimed by G&R as having been built by Chinese rice planters.

At the conference of surveyors (representing McBryde, the State, and G&R), as well as during the course of the trial wherein each of the surveyors representing the parties at the trial testified, all parties, in nearly all cases, used the following guide lines for the proof of ancient taro lands:

(1). *Land Commission Awards and Royal Patents.* The descriptions in the land commission awards were based on surveys by the Land Commission surveyors and the testimony before the Commission. The land commission awards also describe the use of lands adjoining the lands awarded. These descriptions are part of the metes and bounds descriptions, and are based on the survey by the Commission's surveyors and the testimony before it. They are thus eyewitness descriptions made either contemporaneously with the awards of the adjoining lands, or within four years of them, and are entitled to great weight.

Where the descriptions in these documents called for "aina kalo", taro land; "loi", taro patch; "koele", taro lands of the konohikis where hooinas had to labor for certain periods; "auwai", ditch; or "moo", agricultural land[1]; the subject land and the adjoining lands were conceded to be taro lands.

(2). *Auwais.* The ancient taro patches being irrigated by a system of ditches, where the *auwai* was identified, described, sketched or called for in a Land Commission Award or Royal Patent, all parties gen-

[1]Though such lands were not necessarily taro land, the surveyors were in agreement that in Hanapepe Valley "moo" meant wet taro lands.

erally conceded that lands adjoining thereof were ancient taro lands.

Proof of ancient *auwais* were also sought by the use of testimonies of kamaainas perpetuated in 1927 on Kauai in contemplation of Hanapepe water rights litigation. All of these witnesses were called by G&R.

(3). *Topography.* Where the land was level, fertile, and at an elevation where water from *auwais* and adjoining *lois* was available, the parties generally conceded the lands to be ancient taro lands. The dispute regarding this guide line was whether the *auwai* was an ancient *auwai* and whether the land was at such an elevation so that it was capable of being irrigated by an ancient *auwai.*

(4). *Perpetuation of Kamaaina Testimony of 1927.* G&R in contemplation of a suit to determine water rights in Hanapepe Valley, by order of the presiding judge of the Fifth Circuit Court, held hearings from July 7 to July 16, 1927, for the purpose of perpetuating the testimony of seven persons.

The surveyors involved all made extensive use of the kamaaina testimony of 1927. Where the kamaainas in 1927 referred to the land as taro land, the parties did not dispute the fact. Primarily, the dispute regarding such testimony was on the use of the word *kula.* G&R claimed that when the kamaainas referred to a land as "kula", dry land, they meant that the land was never devoted to taro culture in ancient times, hence the land had no appurtenant water rights. The State and McBryde, on the other

hand, claimed that by "kula" the kamaainas meant that the land was not in taro cultivation at the time they first were familiar with the land. This Court sustains the contention made by McBryde and the State that the term "kula" was used by the kamaainas to mean "uncultivated".

(5). *Government Registered Maps.* Government registered maps put in evidence by the State as Exhibits 32(a) to (f) inclusive, which are the same as McBryde Exhibits 1 to 6 inclusive, and the compilation of these 6 maps put in evidence as McBryde Exhibit M-C-7, show the various ancient *auwais* and by broken lines or dash lines show *kuaunas* or taro patch banks.

(6). *Historical Data.* Writings of Captain Vancouver, Hiram Bingham and other early explorers and writers of early Hawaiian history, including correspondence found in the State Archives, generally show that the Hanapepe Valley area was a fertile valley of taro patches.

(7). *Other Method of Proof of Ancient Taro Lands.*

(a) Dr. E. S. Craighill Handy, eminent authority on Hawaiian anthropology and ethnology, testified for McBryde to the effect that Hanapepe was one of the finest areas for taro cultivation that he observed; that *before depopulation* became serious in Hawaii, there was no land to which they could get water for irrigation which was neglected by the Hawaiians. He also testified regarding the ingenuity and skill of the Hawaiians in building irrigation systems. (Emphasis supplied.)

(b) Dr. Kenneth Emory, staff anthropologist at the Bishop Museum since 1920, likewise testified regarding the skill and ingenuity of the early Hawaiians to bring water from distant places to grow taro. Relative to Hanapepe Valley, he stated that every bit of available land *at the time of maximum population* was under cultivation, with all of the ingenuity the Hawaiians had in bringing land into maximum best productivities through their skills in irrigation and so forth. (Emphasis supplied.)

The theory that all land which could have been irrigated was cultivated in wet land taro is not necessarily established by the evidence. As pointed out by both Dr. Handy and Dr. Emory, the above statement is correct if confined to the time of maximum population or before depopulation set in in all of the islands including Kauai. There had been a tremendous decrease in population throughout the Hawaiian Islands, including Kauai and Hanapepe, at about the time of the Mahele.

After reviewing the various authorities and evidence herein in the matter of ancient Hawaiian taro culture, this Court feels that the area of taro land lying fallow would equal at least one-half of that in actual cultivation, which means that out of all wet taro lands under cultivation about the time of the Mahele, at least one-third of such land would lie fallow at all times.

At about the time of the Mahele, the Hawaiians had no use for taro except to eat it. Theirs was a subsistence agriculture, and any theory that the need

for taro was so great that all irrigable land was used for taro cultivation in 1851-1855, or about the time of the Mahele, is not supported by the evidence. Only such irrigable land as there was need for was used for taro cultivation.

Taro Water Duty

62. [As amended R7-269] The parties on both sides have submitted into evidence reports of certain experiments as bases for expert opinions. McBryde relies principally on the scientific experiment reported in McBryde's Exh. M-K-59 and supplemental reports, and accordingly, its chief witnesses, Joel B. Cox and Keith Tester, based their opinion testimonies on such experiment and reports.

G&R rely on two reports, namely, the preliminary report of H. A. R. Austin & Associates, Ltd., (Exh. G&R-G-1), and report of George Robert Ewart, Jr. (Exh. G&R-H-12a).

G&R's Exh. G&R-G-1 is considered to be merely a preliminary report. Thus, Mr. Russell Smith, who testified for G&R, was unable to express any opinion based on that report alone. He has taken the position that, although he admittedly has no personal and direct knowledge as to how each of the other reported experiments was conducted, he is basing his opinions on all the reports submitted in this case.

A cursory examination of the report and testimonies will show that different approaches and methods are reflected in the different experiments. Thus, the Court, in attaching appropriate weight to

the several opinion testimonies, has considered (a) whether, and to what extent, each experiment has attempted and succeeded in its attempt to simulate the ancient Hawaiian practice of taro cultivation, and (b) to what extent each experiment affords accurate data on which opinion testimony of water duty may be based.

Ewart's report and Austin & Associates' experiment show no attempt made on behalf of G&R to simulate ancient Hawaiian taro cultivation.

There was a general agreement between Mr. Joel B. Cox and Mr. Russell Smith relative to Hanapepe Valley as containing three broad areas, namely, mauka, middle and makai, representing three rather separate geological conditions, and that the middle area can be expected to be much more porous than the other two areas.

There is a pattern to the enormous variation in water consumption, which together with the indications derived from moisture equivalent readings and observations of field conditions, provides the best basis for determining a reasonable estimation of water duty for Hanapepe Valley. The moisture equivalent method is an indication of permeability. It was precisely this basis that was employed by the State and McBryde experimenters.

Although Mr. Joel B. Cox admitted that a complete simulation of the ancient Hawaiian practice was impossible or utterly impracticable, extensive efforts were made by the State-McBryde experimenters

to achieve as close a simulation of ancient conditions as possible. Very careful thought and consideration was given by such experimenters to the way their attempted simulation necessarily differed from the ancient Hawaiian practice. They took pains to choose methods which would tend to reduce consumption rather than increase it when confronted with the necessity to divert from the ancient practice, and the taro crops in 1930 were cultivated after all possible efforts were taken to simulate ancient Hawaiian taro cultivation within the realm of practicability.

It goes without saying that the ideal method of determining the average consumption of water throughout Hanapepe Valley would have been to actually measure the consumption of every parcel but that would have been impracticable and too costly.

The experiment conducted on behalf of the State and McBryde represents an honest and tedious effort to understand and simulate the practice of ancient taro cultivation, at least to attain the result with the best scientific approach although not identical in every particular. The extent of the effort of the experimenters can be found in the extensive and detailed data recorded and compiled. Great effort of scholarship and research was expended even before the State-McBryde's experiment was started. Every effort was made by the State and McBryde experimenters to learn about and simulate the ancient Hawaiian conditions, but the resources available to them made it impossible to reproduce identical conditions.

The joint experiment conducted by the then Territory and McBryde in 1930-31 of the entire period of growth over a crop of taro using continuous recorders, large numbers of samples and frequent observations, have been sufficiently demonstrated to be of a quality superior to the tests made by G&R.

Mr. Joel B. Cox testified that he would consider the 70 thousand gallons per acre per day figure arrived at by the experimenters to be a conservative lower limit of rate of consumption under ancient Hawaiian conditions, and further that 80,000 gallons per acre per day would fall within that zone of reasonable interpretation.

63. The Court finds that the duty of water (quantity of water customarily used and necessary to grow an average crop of taro) in Hanapepe Valley at or immediately prior to the award or grant is as follows:

Average consumption (gross)	80,000 gpapd
Plus allowance for circulation	3,000 gpapd
	83,000
Plus 15% for ditch losses	12,450
	95,450
Less 21.4% for kuaunas	20,400 (rounded)
	75,050
Less ⅓ for fallowing	25,000 (rounded)
Average consumption (net)	50,050 gpapd

N.B. "gpapd" means "gallons per acre per day."

63A. [As amended R7-249] There is not sufficient evidence to show the duty of water in the valleys of Manuahi and Koula.

64. [As amended R7-249-250] By reason of their ownership of lands in Hanapepe Valley having appurtenant water rights, the parties are entitled to appurtenant water rights as follows:

McBryde:	50,050 gpapd
	× 98.21 (acres)
	4,915,400 gpd (rounded)
The State:	50,050 gpapd
	× 83.27 (acres)
	4,167,650 gpd (rounded)
Other Land Owners:	50,050 gpapd
	× 29.11 (acres)
	1,456,950 gpd (rounded)
G&R (below Koula & Manuahi)	50,050 gpapd
	× 30.63 (acres)
	1,533,050 gpd (rounded)

G&R is also entitled to appurtenant water rights for 90 acres of land in Koula and Manuahi, the quantity of which can not be determined in the absence of evidence as to the duty of water.

Rice Lands

65. McBryde claims prescriptive water rights for certain lands cultivated in rice for more than the statutory period. These claims are:

McBryde Item 13 D	Part of Kuiloa (island)	1.98 acres
McBryde Item 13 E	Part of Kuiloa (island)	0.86 acre
McBryde Item 13 F	Part of Kuiloa (island)	3.58 acres
McBryde Item 21 S	Part of Eleele	18.15 acres
McBryde Item 14	Part of LCA 3284:4	0.12 acres

McBryde's evidence on rice cultivation on these lands at best was vague, sporadic and inconclusive and fails to establish use of water which was open, notorious, hostile and adverse for any continuous uninterrupted period of 10 years.

There are no records in evidence showing the amount of water diverted for rice cultivation on these parcels of rice land, nor are there records of McBryde's diversions during the period of rice cultivation.

The area claimed by McBryde to have been cultivated in rice in the ili of Kuiloa, 6.42 acres, was less than the area having appurtenant water rights in Kuiloa. The area claimed by McBryde to have been cultivated in rice in the ili of Eleele, 18.15 acres, was less than the area having appurtenant water rights in Eleele. The area cultivated claimed to have been in rice in LCA 3284:4 was less than the area having appurtenant water rights in LCA 3284:4. It follows that since these areas had appurtenant water rights, if in fact McBryde permitted them to be used in rice cultivation that use was not adverse but was in fact a lawful use of ancient appurtenant water rights.

COURT'S EXHIBIT "1"

OWNERSHIP OF LANDS

Owned by McBryde

		Title	Tax Key
*LCAw.	3284	por. Ap. 1 Wahineaea	1-9-03-por. 25
	3284	Ap. 3 "	2-1-01-por. 10
	3284	Ap. 4 "	1-9-03-5
	7321-B	Ap. 1 Kualeho	1-9-02-39 & por. 15
	7631	por. Ap. 1 Kelemoku	1-9-12-por. 24
	7922	Kapaehea	1-9-02-21 & 22
	8036	Aihoi	2-1-01-por. 10
	8182	Heau	1-9-12-por. 24
	8198	Kamano	2-1-01-por. 10
	8254	Ap. 1 Hacleki	1-9-12-por. 24
**	8254	por. Ap. 2 "	1-9-12-7 & 8
	9029	Kachuliha[illegible]	1-8-05-11
*	9232	Ap. 1 Kaaaalea	por. 1-9-04-23 & 1-9-12-45 & 49

EXHIBIT 1
PAGE 1

			Title		Tax Key
*LCAw.	10016		por. Ap. 2	Keno	1-9-12-46 & 48
	10271		por. Ap. 1	Makailio	1-8-05-14
	10922			Ula	1-9-02-16 & por. 15
	11011		Ap. 1	Palama	2-1-01-por. 10
	Kam IV		Ap. 2	Aihoi	1-9-01-5
**	5309	Und. Int.		Kanakamaikai	1-8-03-8
**	5447	Und. Int.	# Ap. 1	Nuanua	1-8-03-6
**	5447	Und. Int.	Ap. 3	"	1-8-03-12
**	7928		Ap. 1	Maluaikoo	1-8-03-por. 3
**	7928		Ap. 2	"	1-8-03-por. 3
**	9135	Und. Int.	Ap. 1	Kalepona	1-8-03-15
**	10010			Makahiki	1-8-03-por. 3
**	10526			Maloheelua	1-8-04-por. 8
**	M. Aw. 19-B			Kanehiwa	1-8-04-por. 8
*Ili of Kuiloa			LCAw. 5572-B	Ap. 3 Kaaha	Various
*Ili of Eleele			LCAw. 7712	Ap. 5 Kekuanaoa	Various

*Portion water rights only
**Water rights only

Note # "Nuanua" erroneously to read "Nuanua".

N.B. # "Nuanua" re-spelled to read "Nuanua".

Owned by C&R

		Title	Tax Key
LCAw. 3284		Ap. 2 Wahineaea	1-9-01-12 & 13
5309	Und. Int.	Kanakamaikai	1-8-03-por. 8
5447	Und. Int.	Ap. 1 Nuanua	1-8-03-6
5447		Ap. 2 "	1-8-03-por. 8
5447	Und. Int.	Ap. 3 "	1-8-03-12
6578		Ap. 2 Paele	1-9-03-por. 8
7919		Kaiahauna	1-9-02-5
7993		Ap. 1 Pala	1-9-02-17 & 18
8020		por. Ap. 1 Asa Kapoi	1-9-12-por. 12
8020		Ap. 2 " "	1-9-02-10
8077	Und. Int.	Ap. 2 Hii	1-9-01-4
8077		Ap. 3 "	1-9-01-por. 6
8123		Holeka	1-9-12-3
9135	Und. Int.	Ap. 1 Kalepona	1-8-03-15
9142		por. Ap. 1 Kapekue	1-9-12-40

	Title	Tax Key
*LCAw. 9190	por. Ap. 1 Kupia	1-9-02-8, 9 & 43 1-9-12-1 & 30
9265	Kipani	1-8-04-2
9283	Ap. 2 Keliinui	1-9-12-27
10069	Maluihi	1-9-03-por. 8
10274	Palahe	1-8-04-9
10275	Makaino	1-8-03-por. 8
10312	Ap. 1 Namaielua	1-9-12-por. 12
10349	Nakapa	1-8-03-23
10678	Ap. 1 Pua	1-8-03-14
11011-B	Makaiku	1-9-01-por. 6
11068	Wailele	1-8-04-7

*Portion water rights only

Owned by State of Hawaii

Title	
LCAw. 9116	por. Ap. 1 Koolau

Government lots 1 through 55 and remnants**

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**Water rights only as to lots 6B and 54B

Owned by Others

	Title	Tax Key	Owners
*LCAw. 3284	por. Ap. 1 Wahineaea	1-9-03-11, 23, 26	Wilfred K. Dung & Lily A. Kamaki
3654	por. Ap. 2 Kamae	1-9-03-12	County of Kauai
3654	por. Ap. 2 "	-28	Ann N. Kali
3654	por. Ap. 2 "	-29	Robert K. Kali
5447	por. Ap. 2 Nuanua	1-8-03-por. 29	Ida K. Horner
7321-B	Ap. 2 Kualeho	1-9-01-18 & 19	Albert K. Kaailau & Hideo Nonaka
7631	por. Ap. 1 Kelemoku	1-9-12-9	Toshio Komaki, Lily A. Komaki & Wilfred K. Dung
7677	Ap. 1 Kamalana	1-9-12-por. 20	Kiichi Shimomura
7920	Kikoi	1-9-02-26 & 27	Kiyoshi Kimata
7923	Kekeko	1-8-03-07	Ida K. Horner
7925	Keawe	2-1-01-8	William H. Makanui, Jr. & Heirs of J. R. Kaeulii
8011	Alihi	1-8-05-05	George Makanui, May M. Corr, Shirley M. Mokunui, Morris Mokunui, Abraham Mokunui, George Mokunui & Heirs of Louisa Mokunui
8020	por. Ap. 1 Asa Kapoi	1-9-12-22	Hideo Nonaka & Albert K. Kaailau

		Title	Tax Key	Owners
LCAw.	8020	por. Ap. 1 Asa Kapoi	1-9-12-23	Takano Nonaka, Kazuo Nonaka, Takao Nonaka, Hideo Nonaka, Masatoshi Nonaka, Iwao Nonaka, Shigeichi Nonaka & Hirami Nonaka
	8020	por. Ap. 1 " "	1-9-12-51	County of Kauai
	8077	Ap. 1 Hii	1-9-02-11	Junichi Kano & Harriet U. Kano
	8077 Und. Int.	Ap. 2 "	1-9-01-4	Leileihua Dung
	8215	# Ap. 1 Iese	1-9-12-4	Henry J. Chu & Helen B. H. Chu
	8254	por. Ap. 2 Haoleki	1-9-12-32	Heirs of Rachel K. Kaohi
	9116	por. Ap. 1 Koolau	1-9-12-por. 10	Elizabeth Y. Chang
	9142	por. Ap. 1 Kapekue	1-9-12-19	Fannie K. Petens et al.
	9189	por. Ap. 1 Keawe	1-9-12-55 & Por. 16	Kuulei Wong
	9189	por. Ap. 1 "	1-9-12-54	County of Kauai
	9190	por. Ap. 1 Kupia	1-9-12-29	Chee Kung Fui Society
	9190	por. Ap. 1 "	1-9-02-47	County of Kauai
	9232	## por. Ap. 2 Kaaaaoloa	1-9-12-26	Henry J. Chu & Helen B. H. Chu
	9232	por. Ap. 2 "	1-9-12-por. 38	Bart Dai Sin Mew Church Tai Hing Leong, Trustee
	9272	por. Kaipehu	1-9-12-14 & 53	Albert K. Kaailau & Hideo Nonaka
	9272	por. "	1-9-12-52	County of Kauai

N.B. # "Lese" corrected to read "Iese".
"Kaaaoloa" corrected to read "Kaaaaoloa".

		Title		Tax Key	Owners
LCAw.	10017	por.	Lauki	1-9-12-25 & 42	Tai Hing Leong & Lo Sun D. Leong
	10017	por.	"	-43	Marcellino Francisco & Lapaz Francisco
	10271	por. Ap. 1	Makailio	1-8-05-13	Kauanui Kaluna & James W. Smith
	10271	Ap. 2	"	1-8-05-4	William H. Makanui, Jr. Julia L. Makanui, Betty P. Makanui, Joseph K. Makanui, & Bernard H. Makanui
	10271	Ap. 3	"	1-8-05-6	William H. Makanui, Jr. Julia L. Makanui, Betty P. Makanui, Joseph K. Makanui & Bernard H. Makanui
	10275	por.	Makaino	1-8-03-por. 29	Ida K. Horner
	10311	Ap. 3	Kamoku	1-9-12-por. 16	Kuulei Wong
	10595	por. Ap. 1	Puakala	1-9-11-13	Hideo Nonaka & Albert K. Kaailau
	10595	por. Ap. 1	"	1-9-11-20	County of Kauai
	10595	Ap. 2	"	1-9-12-21	Hideo Nonaka & Albert K. Kaailau
R. P.	4504	por.	Sigalas	1-9-01-17	Takano Nonaka, Kazuo Nonaka, Takao Nonaka, Masatoshi Nonaka, Iwao Nonaka, Shigekichi Nonaka & Hiromi Nonaka
Gr.	7663		Nanakaole	1-9-02-25	Claude M. Kapukui
Gr.	7686	por.	Rose Ah Pa	1-9-02-23	Henry J. Chu
Gr.	7686	por.	"	-38	Wallace A. Naumu & Hinayo T. Naumu

*Portion water rights only owned by others.

EXHIBIT A
COURT'S EXHIBIT "2"

*Portion water rights only owned by others.

EXHIBIT 1

COURT'S EXHIBIT "2"

EXHIBIT E

Taro Land of Other Private Owners

Title L. C. Aws.			Tax Key	Taro Land Area	Owner
3284	Portion Ap. 1	Wahineaea	1903-11	1.00	Wilfred A. Dung & Lily A. Kamaki
3654	Ap. 2	Kamae	1903-12, 28, 29	1.47	Robert K. Kali & Ann K. Kali County of Kauai
5447	Portion Ap. 2	Nuanua	1803-Por. 29	1.45	Ida K. Horner
7321-B	Ap. 2	Kualeho	1901-18 & 19	0.65	Albert K. Kaailau & Hideo Nonaka
7631	Portion Ap. 1	Kelemoku	1912-9	0.69	Toshio Komaki, Lilly A. Komaki & Wilfred A. Dung
7677	Ap. 1	Kamalama	1912-Por. 20	0.70	Kiichi Shimomura
7920		Kikoi	1902-26 & 27	1.10	Kiyoshi Kimata
7923		Kekeko	1803-7	0.80	Ida K. Horner
7925		Keawe	2101-8	0.90	Unknown heirs of J. R. Kaealii, Viclet A. K. Makanui, Julia L. Makanui, Betty P. Makanui, Joseph K. Makanui, Bernard H. Makanui & William H. Makanui, Jr.
8011		Alihi	1805-5	1.00	George Makanui, unknown heirs of Louisa Makanui, May M. Corr, Shirley M. Mokunui, Morris Mokunui, Abraham Mokunui & George Mokunui
8020	Portion Ap. 1	Asa Kapoi	1912-22 & 23	1.03	Hideo Nonaka, Albert K. Kaailau, Takano Nonaka, Kazuo Nonaka, Takao Nonaka, Hideo Nonaka, Masatoshi Nonaka, Iwao Nonaka, Shigekichi Nonaka & Hiromu Nonaka
8020	Portion Ap. 1		1912-51	0.27	County of Kauai

Title L. C. Aws.				Tax Key	Taro Land Area	Owner
8077		Ap. 1	Hii	1902-11	0.60	Junichi Kano & Harriet U. Kano
8077	Und. Int.	Ap. 2	Hii	1901-4	0.27	Leilehua Dung
8215		Ap. 1	Iese	1912-4	0.52	Henry J. Chu & Helen B. H. Chu
8254	Portion	Ap. 2	Haoleki	1912-32	0.14	Unknown heirs of Rachel K. Kaohi
9116		Ap. 1	Koolau	1912-Por. 10	2.35	Elizabeth Y. Chang
9142		Ap. 1	Kapekue	1912-19	0.43	Fannie K. Peters
9189		Ap. 1	Keawe	1912-Por. 16 & 55	1.0	Kuulei Wong
9189		Ap. 1	Keawe	1912-Por. 54	0.29	County of Kauai
9190	Portion	Ap. 1	Kupia	1912-29	0.86	Chee Kung Fui Society
9190	Portion	Ap. 1	Kupia	1902-47	0.03	County of Kauai
9232	Portion	Ap. 2	Kaaaaolea	1912-26 & Por. 38	1.06	Part Dai Sin New Church, Tai Hing Leong - Trustee, Henry J. Chu & Helen B. H. Chu
9272			Kaipehu	1912-14 & 53	0.22	Albert K. Kaailau & Hideo Nonaka
9272			Kaipehu	1912-52	0.22	County of Kauai
10017		#	Lauki	1912-25, 42 & 43	0.95	Tai Hing Leong, Lo Sun Dang Leong, Marcellino Francisco & Lapaz Francisco
10271	Portion	Ap. 1	Makailio	1905-13	0.25	Keuanui Kaluna & James W. Smith
10271		Ap. 2	Makailio	1905-4	0.60	Violet A. K. Makanui, William H. Makanui, Jr., Julia L. Makanui, [illegible] Makanui, Joseph K. [illegible]

Title L. C. Aws.			Tax Key	Taro Land Area	Owner
10271		Ap. 3 Makailio	1806-6	0.25	Violet A. K. Makanui, William H. Makanui, Jr., Julia L. Makanui, Betty P. Makanui, Joseph K. Makanui, & Bernard H. Makanui
10275	Portion	Makaino	1803-Por. 29	0.99	Ida K. Horner
10311		Ap. 2 Kamoku	1912-Por. 16	0.54	Kuulei Wong
10595		Ap. 1 Puakala	1911-13	0.33	Hideo Nonaka & Albert K. Kaailau
10595		Ap. 1 Puakala	1911-20	0.25	County of Kauai
10595		Ap. 2 Puakala	1912-21	1.28	Hideo Nonaka & Albert K. Kaailau
R.P. 4504	Portion		1901-17	4.20	Takano Nonaka - L/l Kazuo Nonaka Takeo Nonaka, Hideo Nonaka, Masatoshi Nonaka, Iwao Nonaka, Shigekichi Nonaka & Hiromi Nonaka
Gr. 7663 (Lot 54-A)		Nonakaolo	1902-23	0.12	Claude M. Kapukui
Gr. 7696		Rose Ah Pa	1902-23 & 33	0.30	Henry J. Chu, Wallace A. Naumu, & Hinayo T. Naumu
			TOTAL	29.11	

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Conclusions of Law

Burden of Proof

The burden of proof is upon McBryde to establish the allegations of its complaint, specifically the areas it must prove by credible evidence what lands it has which are entitled to appurtenant water rights and the consumption of water of such lands. It has the burden of establishing by competent evidence each and every element of its adverse possession, prescription or adverse use claims; that its takings of water (over and above its appurtenant water rights) were actual, open, notorious, continous, hostile, exclusive and adverse to the true owner. Adverse use is to be taken strictly and every presumption is in favor of a use in subordination to the rightful owner. *Territory v. Pai-a,* 34 Haw. 722; *Lalakea v. Haw'n. Irrig. Co.,* 36 Haw. 692; *Tagami v. Meyer,* 41 Haw. 484.

Appurtenant Water Rights

1. When land was awarded by the Land Commission or granted by the King or government, the award or grant included the right to water in the quantity which was customarily used on the land at and immediately before the date of the award or grant.

Carter v. Territory, 24 Haw. 47, at page 64:

> ". . . Like the rights which passed to lands awarded by the land commission, it was a right to such quantity of water as was customarily used on the land at and immediately before the

date of the grant so long as that quantity continued to be available. . . ."

See also: *Territory v. Gay,* 31 Haw. 376, at page 383:

". . . Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes, the land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named. . . ."

Hutchins, *The Hawaiian System of Water Rights,* pp. 104-106.

2. Earlier cases holding that the awards carried with them a right to the water which the lands used by "immemorial custom" are consistent with *Carter v. Territory* and *Territory v. Gay,* supra. An immemorial custom at the time of the Land Commission would be one which had then existed for as long as anyone could remember.

Black's Law Dictionary, 4th ed., p. 884, "immemorial usage":

"A practice which has existed time out of mind."

Accord: 20 *Words and Phrases* 211 "immemorial use":

" 'Immemorial use is a use time out of mind, or from a time whereof the memory of man is not to the contrary.' "

3. One of the reported cases using the word "immemorial" is *Peck v. Bailey*, 8 Haw. 658 (before Allen, C. J., sitting alone 1867):

> "There can be no difference of opinion that the complainants were entitled to all the water rights which the lands had by prescription at the date of their title. By the deed, the water courses were conveyed and a right to the water accustomed to flow in them. The same principle applies to all the lands conveyed by the King, or awarded by the Land Commission. If any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance. . . . (p. 661)
>
> ". . . Each grantee will hold all that has been conveyed to him, unless it should conflict with a previous conveyance. This includes the water courses on their lands, and all the water which the lands had enjoyed from time immemorial. . . ." (p. 662)

Two other cases *Davis v. Afong*, 5 Haw. 216, 224, and *Mele v. Ahuna*, 6 Haw. 346, 349, refer to water which had been used "from ancient times." Such references to the use of water which had persisted *from* time immemorial or ancient times are in no way in conflict with the holding of *Carter v. Territory* and *Territory v. Gay*, supra, that the use must persist *until* "at and immediately before" the Land Commission award if it is to be transformed into a vested right by that award. Prior to the Mahele the King was the owner of all the land and all water rights. The title vested in private ownership upon the issu-

ance of the award or grant and not before. (Emphasis supplied.)

This Court holds that when our Supreme Court uses the expression "from time immemorial", it means the condition of the land and its continuous use as long as anyone can remember up to the date of the award. It does not mean some use that may have existed in the days of the first discovery which did not continue right up to the date of the determination by the land commission.

4. The traditional method of describing the quantity of water rights, and of decreeing their apportionment has been in terms describing the dams, ditches and time schedule of diversion: *Wilfong v. Bailey,* 3 Haw. 479; *Wong Kim v. Kioula,* 4 Haw. 504; *Loo Chit Sam v. Wong Kim,* 5 Haw. 130; *Mele v. Ahuna,* supra; *Peck v. Bailey,* supra; *Lonoaea v. Wailuku Sugar Co.,* 9 Haw. 651; *Chun Lai v. Mang Young,* 10 Haw. 133; *Horner v. Kumuliilii,* 10 Haw. 174; *See Yick Wai Co. v. Ah Soong,* 13 Haw. 378.

Apportionment by time schedule is expressly authorized by the statute governing water commissions. R.L. 1955, §234-33. However, there is precedent for a decree framed in terms of gallons per day. *Hilo Boarding School v. Territory,* 23 Haw. 595.

5. [As amended R7-248] Each of the parties having appurtenant water rights shall receive a continuous flow of water equal to the acreage of taro land found above (Findings Nos. 56 through 61, as amended) times the typical duty of water found above of 50,050 gallons per acre per day (Findings Nos. 63 and 64).

The above conclusion, however, does not apply to the lands of G&R in Koula and Manuahi, which the Court has found includes 90 acres entitled to water rights, without satisfactory evidence of their duty of water. (Findings 63A and 64). This leaves undecided the quantity of water to which said 90 acres may be entitled.

Surplus Water Rights

6. The normal surplus waters rising and flowing from Koula and Manuahi streams belong to G&R. *Territory v. Gay,* supra, affirmed 52 F. 2d 356, cert. denied 284 U. S. 677.

7. Surplus waters are those of a stream in excess of the quantities required to satisfy established rights including ancient appurtenant rights, prescriptive rights, and rights conveyed by deed. *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.,* 15 Haw. 675; Hutchins, *The Hawaiian System of Water Rights,* 70-74.

8. The division of surplus water into "normal surplus" and "storm or freshet" surplus originated in *Carter v. Territory,* supra, at page 70, in which it was decided that "storm or freshet" waters of a stream which flows through two or more *ahupuaas* must be apportioned between them according to riparian law.

9. Some language in *Carter v. Territory,* supra, applied literally to all surplus water, although the Supreme Court was only dealing with storm surplus. (There was no surplus in that stream except in times of storm or freshet.) In *Territory v. Gay,* supra, the

court held that the normal surplus of a stream belonged to the konohiki of the land on which it arose.

10. The trial court in *Territory v. Gay,* 1st Cir. Eq. 2911, affirmed 31 Haw. 376, had found that the ownership of the storm or freshet surplus was moot, since none of its was being diverted by G&R. On appeal, a majority of the Supreme Court (Perry, C. J. and Parsons, J.), held that normal surplus belonged to G&R. However, no decision was reached as to storm or freshet waters. Perry, C. J. would have overruled *Carter v. Territory,* supra, and awarded all surplus water, both normal and storm or freshet, to G&R. Parsons, J. took the view that the correctness of *Carter v. Territory,* supra, should not be reviewed until the issue was squarely presented. Banks, J. would have adopted riparian law in place of our traditional water law.

11. None of these decisions define "normal", "storm", or "freshet" surplus. The one thing that is clear is that these terms are meant to be complementary; "normal" surplus leaves off where "storm or freshet" surplus begins.

12. In neither *Carter v. Territory* nor *Territory v. Gay,* supra, did the Supreme Court compute the dividing line between "normal" and "storm or freshet" surplus, nor indicate how it is to be done.

13. It is uncertain whether the rule of *Carter v. Territory,* supra, is still the law of Hawaii. *Territory v. Gay,* supra, invites reconsideration of the rule but only if the facts require it. In this case, the water measurements are such that the Court finds

that both normal surplus as well as storm and freshet surplus waters are involved, and this Court must determine who are entitled to them.

Perry, C. J. in *Territory v. Gay,* supra, at pages 393-403, reviewed the objections to applying the law of riparian rights to "storm or freshet surplus" accurately and at length. They are concurred in by Hutchins, *The Hawaiian System of Water Rights,* pp. 94-98. This Court holds that all the surplus waters of Koula and Manuahi streams, without distinction between "normal" and "storm or freshet" surplus, belong to G&R on whose land they rise.

It is unnecessary to repeat the cogent reasons of Perry, C. J. and Hutchins, except to point out that they are substantiated with particular force here:

(a) The Chief Justice's prediction that it would be difficult to determine "what precise line is to be drawn in practice between the higher normal flows and the smaller freshets" (Perry, C. J., 31 Haw. 392) is demonstrated by the evidence in this case;

(b) Under the rule as expressed in *Carter v. Territory,* supra, at page 70, the "storm or freshet surplus" must be used on the ahupuaas or ilis kupono through which the stream passes. This is because of the riparian rule which limits the use of water to lands on the "ripa" or bank of the river. *Territory v. Gay,* supra, at pages 396-7. These riparian lands already have ample water rights sufficient for sugar cultivation, and the important economic use for the storm and freshet waters is for the irrigation of dry kula lands outside the Hanapepe Valley. Much of the

so-called riparian lands already has appurtenant water rights as herein determined by the Court.

(c) Riparian rights vary from time to time, Hutchins, *The Hawaiian System of Water Rights* 97, according to many factors, including the use which other riparian owners may wish to make of the water. Irrigation systems of the sugar plantations involved in this case show that large capital investments are necessary for the use of this water. The upkeep and expansion of these systems will be discouraged if those who make the investments know that their rights to the water may be changed whenever other riparian owners develop a new potential use for the water. The policy of the statute creating water commissions is to determine water rights so that they may be relied on by their owners. This objective would be defeated if water rights are subject to periodic revision.

Prescriptive Rights

14. The above conclusions as to the quantity of appurtenant and surplus water rights describes those rights as created by the Land Commission awards. It remains to be considered whether they have been altered by adverse use or prescription.

Elements of Prescription. In order to establish a prescriptive title to a water right, there must have been an "actual, open, notorious, continuous and hostile use" of the water against the rightful holder for the period prescribed by the statute of limitations, to wit, Sec. 241-30, R. L. H. 1955. *Territory v. Gay*, supra, at p. 383. The use must also have been under

a claim of right. *Davis v. Afong,* supra, at page 221; *Wong Leong v. Irwin,* 10 Haw. 265, 271; *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.,* 20 Haw. 658, 666.

Continuity of Use. The general principle is that use of the water shall have been continuous during the statutory period. This necessarily does not mean that the water must have been taken and used incessantly; the use is adverse if water is taken whenever required for the purpose for which the right is claimed, and this need not be done at regular periods. *Davis v. Afong,* supra, at page 221.

The continuity of use necessary to support a prescriptive title is interrupted if the rightful owner diverts the water for his own use during a fraction of the prescriptive period and thus prevents the use by the adverse claimant at a time when needed. *Kohala Sugar Co. v. Wight,* 11 Haw. 644, at 649-654.

A use of water made without resistance during the times when the supply was adequate for all claimants, but forcibly and successfully resisted when the water supply was short, could not be the basis of an adverse right, for no one was injured by the use which was actually made during the time of ample water supply. *See Yick Wai Co. v. Ah Soong,* supra, at page 382; *Palolo Land & Improvement Co. v. Wong Quai,* 15 Haw. 554, 560, 562.

The general principle that the statute of limitations does not run against the government, such as the State of Hawaii, has been recognized in Hawaii, as elsewhere.

Adverse Use or Prescriptive Claims of McBryde

15. During the years 1934-1949, McBryde diverted 7 million gallons per day or more from the river for a period of more than 10 years.

16. The days during this period on which McBryde's recorded takings were less than 7 million gallons per day were so few, and generally explicable by the absence of need or the failure of pumps or measuring devices, that they do not amount to discontinuance of diversion.

17. Attempts by McBryde to take more than 7 million gallons per day were interrupted by HS Co.'s and later G&R's diversions of so much water that McBryde was unable to take more than 7 million gallons per day. These interruptions each lasted several days, and make at least three interruptions in any 10-year period, as shown in finding "55" herein. The Court thus concludes that McBryde's diversions of water from the Hanapepe River were actual and continuous only up to 7 million gallons per day.

18. As shown in finding "64" herein, by reason of their ownership of lands having appurtenant water rights, the parties are entitled to total appurtenant water rights as follows:

McBryde	4,915,400 gpd (rounded)
The State	4,167,650 gpd (rounded)
Other Land Owners	1,456,950 gpd (rounded)
G&R (below Manuahi & Koula)	1,533,050 gpd (rounded)
G&R (Manuahi & Koula)	Unknown

McBryde during these periods took as much water as there was in the river. The County of Kauai, a

political subdivision of the State, took 225,000 gpd (Finding No. 33), leaving 4,167,950—225,000=3,942,650 which was either wholly or partially taken by McBryde. McBryde can acquire no right to this water against the State, since prescription does not run against the sovereign, or against anyone else, since the water was the State's.

19. There is no evidence about the diversions of the "others" during this period, although since McBryde was diverting as much water as passed the USGS station at the junction of Koula and Manuahi, it is unlikely that the "others" were taking any.

20. The original lease to Watson, assigned six days later to HS Co., gave the lessee the right to take "all" the waters of Koula, but did not require it to do so. HS Co. was free to build such dams and ditches as it deemed appropriate, in such locations as it pleased, and to take whatever quantity of water it wanted, limited only by the appurtenant rights of downstream owners. See *Cross v. Hawaiian Sugar Co.*, 12 Haw. 415. G&R's right to any part of this water was limited to a proportion of the water which was in fact diverted.

21. A supplementary agreement was made between G&R and HS Co. on February 21, 1930, giving G&R the right to divert water from its "wet (taro) lands" in Koula, Manuahi and Hanapepe, but *not* "above the intakes of the present Koula and Olokele ditches." Nothing in this agreement impaired the right of HS Co. to the first chance at the waters; all it conferred on G&R was the right to take HS Co.'s leftovers. HS

Co. remained in control of the waters, having the upper hand because it had the upper dam.

22. Whether the waters taken by McBryde from the Hanapepe stream were those leased to HS Co. by G&R or not, the taking constituted an injury to G&R's inheritance for which G&R could have brought an action at common law or in equity throughout the measured period 1934-March 1949, or a statutory proceeding before the Commission of Private Ways and Water Rights to prevent McBryde from taking more waters than those to which it was entitled at all times during the measured period, 1934-March 1949.

Wong Leong v. Irwin, supra, at page 271; *Long v. Wai Fong*, 9 Haw. 628.

As a reversioner, being the lessor of HS Co., G&R had a cause of action during the measured period 1934-March 1949 for an injury to their inheritance because of the possibility of McBryde's acquiring prescriptive rights against the reversion.

23. Since, as shown in conclusion "15" herein, McBryde diverted 7 million gallons or more of water per day for a period of more than 10 years under a claim of right and such use was actual, open, notorious, continuous and hostile against the owners of such water, it has acquired title to such water by adverse use or prescription to the extent of the difference between 7 million gallons and the quantity of water to which it has appurtenant rights, to wit:

7,000,000 gallons per day (quantity diverted)
Less 4,915,400

2,084,600 gallons per day

Prescriptive Claim of McBryde for Rice Lands

24. The lands for which McBryde claims a prescriptive use of water for rice lie in its ilis of Kuiloa and Eleele and LCA 3284:4. In each ili, and in LCA 3284:4, the lands so claimed is less than the land in that ili or award having appurtenant water rights.

The owner of water rights may use that water on any of his land, and is not limited to using it on the land to which it originally appertained. *Peck v. Bailey,* supra, at pages 665-6, 672; *Lonoaea v. Wailuku Sugar Co.,* supra, at page 665; *Wong Leong v. Irwin,* supra; *Foster v. Waiahole Water Co., Ltd.,* 25 Haw. 726; *Territory v. Gay,* supra.

Such a transfer does not create additional water rights, even if continued for the prescriptive period. *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.,* supra, at page 686:

> ". . . Where water has been transferred to kula land from ancient taro lands, the proprietor, after the use on the kula lands has continued for the statutory period, is too likely to be led to indulge in the view that the kula has acquired a prescriptive right to the water and that the taro lands have at the same time retained their ancient right and not lose it by abandonment. That, of course, is a mistaken view. Water rights cannot be doubled in that way. . . ."

In this case it may even be an exaggeration to say that the water was transferred, since it was used, not on other awards, but simply on another part of the same Land Commission award. In addition, once

Kuiloa, Eleele and LCA 3284:4 came into McBryde's hands (as they were in most of the period by which it claims prescription) water could be transferred to them from McBryde's other lands having appurtenant rights.

The evidence does not show that Kuiloa, Eleele, and LCA 3284:4, or any of them, was using more water in the claimed prescriptive period than it was entitled to by appurtenant rights. In the absence of such evidence, the claim of adverse use or prescription is not established.

Summary of Findings of Fact and Conclusions of Law

Upon a thorough review of the law and the evidence above, the Court finds and concludes as follows:

1. The lands of the various parties entitled to appurtenant water rights in Hanapepe Valley are as follows:

McBryde	98.21 acres
State	83.27 acres
G&R Koula & Manuahi	90.00 acres
Below Koula & Manuahi	30.63 acres
Others	29.11 acres
Total	331.22 acres

2. The duty of water (quantity of water customarily used and necessary to grow an average crop of taro) in Hanapepe Valley below the junction of Koula and Manuahi streams at or immediately prior to the award or grant is 50,050 gallons per acre per day.

3. [As amended R7-246] By reason of their ownership of lands in Hanapepe Valley having appurtenant water rights, the parties are entitled to the following appurtenant water rights:

McBryde	4,915,400 gpd (rounded)
State	4,167,650 gpd (rounded)
Other Land Owners	1,456,950 gpd (rounded)
G&R (below Manuahi & Koula)	1,533,050 gpd (rounded)
(Manuahi & Koula)	Unknown

4. McBryde has acquired title to water in the Hanapepe River by adverse use or prescription to the extent of 2,084,600 gallons per day.

[Conclusion 23]

5. The evidence herein does not show that any of the rice lands for which McBryde claims prescriptive rights was using more water in the claimed prescriptive period than it was entitled to by appurtenant rights. In the absence of such evidence, the claim of adverse use or prescription is not established.

[Conclusion 24]

6. This Court holds that all the surplus waters of Koula and Manuahi streams, without distinction between "normal" or "storm or freshet" surplus, belong to G&R on whose land they arise.

[Conclusion 13]

7. The Court having fixed the appurtenant water rights of McBryde, the State, other land owners, and G&R as shown in conclusion "3" above, and also the prescriptive water rights acquired by McBryde, as shown in conclusion "4" above, and also by reason of G&R's being entitled to all surplus waters, as shown

in conclusion "6" above, it follows that G&R are entitled to all waters in excess of such waters to which the above named parties are entitled by reason of the ownership of their respective appurtenant water rights and prescriptive water rights.

8. The Court has thoroughly reviewed other issues raised during the course of the trial, but these findings of fact and conclusions of law cover all pertinent issues raised by the parties for the determination of water rights in Hanapepe Valley.

9. A judgment determining the rights of the parties will be entered. Counsel are directed to submit a form of such judgment not later than January 15, 1969.

Dated: Lihue, Kauai, Hawaii, December 10, 1968.

/s/ Benjamin M. Tashiro
Presiding Judge

Attest:

Barbara Haruki
Clerk

Syllabus

McBRYDE SUGAR COMPANY, LIMITED, Plaintiff-Appellant, Cross-Appellee, *v.* AYLMER F. ROBINSON, et al., Defendants-Appellees, Cross-Appellants.

No. 4879

APPEAL FROM FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, JUDGE

JANUARY 10, 1973

RICHARDSON, C.J., MARÚMOTO, ABE, LEVINSON, JJ., AND CIRCUIT JUDGE OGATA IN PLACE OF KOBAYASHI, J., DISQUALIFIED

JUDGMENT—*res judicata.*

Under the doctrine of res judicata, an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

COURTS—*stare decisis.*

The doctrine of stare decisis relates to the legal principle that may be extracted from an adjudication of a claim for relief or an issue and the application of such principle in a subsequent action between strangers to the record involving a similar claim for relief or issue. The doctrine, however, is subordinate to legal reasons and justice and a court will overrule a former decision when the result is manifest justice.

WATER AND WATERCOURSE—*natural watercourses—title to water rights—Great Mahele.*

Even assuming that the King by his mahele granted ilis of Manuahi and Koula to the awardees as ilis kupono, the King, having retained the ahupuaa of Hanapepe fed by the Koula Stream and Hanapepe River, in the absence of an expressed intent on his part to convey his right to surplus water, should not be deemed to have transferred such right.

REAL PROPERTY—*ili kupono.*

Where one half of an ili kupono was maheled to a konohiki and the other half was retained by the King as crown land, a conveyance of the King's half to the government, and the government's subsequent conveyance does not make the whole of the ili an ili kupono.

WATER AND WATERCOURSE—*natural watercourses—title to water rights—Great Mahele and Land Commission Awards.*

Right to water was not intended to be, could not be, and was not trans-

ferred to an awardee by the Great Mahele and subsequent Land Commission Award and issuance of Royal Patent.

SAME—*same—same.*

The ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good.

SAME—*same—appurtenant water rights—Great Mahele and Land Commission Awards.*

It is the general law of this jurisdiction that when land allotted by the mahele was confirmed to an awardee by the land commission and/or when a royal patent was issued based on such award such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing.

SAME—*same—same—burden of proof.*

The burden of proving the amount of water actually being used for taro cultivation at the time of the Land Commission Award is on the person claiming appurtenant water rights.

SAME—*same—same—determination.*

In determining appurtenant water rights, the trial court, sitting as Commissioner of Private Ways and Water Rights, shall determine as precisely as possible the amount of water that was actually being used for taro cultivation at the time of the Land Commission Awards. The extent of land under taro cultivation in earlier or later time is irrelevant.

SAME—*same—same—fallowed taro land.*

A reduction in acreage for fallowing should be made in the determination of appurtenant water rights when it appears that at the time of the Land Commission Awards water was not being used to cultivate taro on certain acreage.

CIVIL PROCEDURE—*water rights case—applicability of Hawaii Rules of Civil Procedure.*

Proceedings before the circuit court sitting as Commissioner of Public Ways and Water Rights pursuant to HRS Ch. 664, Part III are subject to the Hawaii Rules of Civil Procedure. HRCP Rule 81 (a).

APPEAL AND ERROR—*review—findings of fact.*

The trial court's determination of the parties' "appurtenant water rights" will not be set aside unless clearly erroneous. HRCP Rule 52 (a).

WATER AND WATERCOURSE—*natural watercourse—appurtenant water rights—extent of right to use water.*

The right to the use of water acquired as an appurtenant right may only be used in connection with the particular parcel of land to which the right is appurtenant, and any contrary indication in Hawaii case law is overruled.

SAME—*same—riparian rights.*

The "right to drinking and running water" guaranteed by the "Enactment of Further Principles," Laws 1850, RLH 1925 (Appendix, Vol. 2, 2141 et seq.) see also HRS § 7-1, secured for a proprietor of land adjoining natural watercourses riparian water rights.

Opinion of the Court

SAME—*same—same—extent of right to use water.*

Riparian water rights include the right to use water flowing on land adjoining natural watercourses without prejudicing the riparian rights of others, or the right of others to the natural flow of the watercourse without substantial diminution and in the shape and size given it by nature.

SAME—*same—same—riparian owners.*

Riparian rights belong only to land adjoining a natural watercourse for its own use.

PROPERTY—*adverse use—state ownership.*

One may not claim title to or interest in state-owned property by adverse use.

WATERS AND WATERCOURSES—*natural watercourse—riparian rights—normal daily surplus water.*

"Normal daily surplus water" contemplates an excess of water after all the owners of land adjoining a natural watercourse have their water rights determined. Since the recognition of riparian water rights entitle owners of land adjoining natural watercourses to have the flow of a watercourse in the shape and size given it by nature, there can be no quantity of water deemed "normal daily surplus water."

SAME—*same—same—storm and freshet waters.*

Since water was reserved to the State for the common good when parcels of land were allotted to awardees under the mahele, storm and freshet water is the property of the State and *Carter* v. *Hawaii*, 24 Haw. 47 (1917) is overruled.

OPINION OF THE COURT BY ABE, J.

This is an appeal from the judgment of the Circuit Court of the Fifth Circuit, which determined the water rights of parties who are owners of land situated in the Hanapepe Valley on the Island of Kauai. The trial lasted from May 5 through August 17, 1965. The record of this case includes transcript of testimony of witnesses comprising 3,483 pages and voluminous documentary exhibits.

In arriving at its decision, the trial court first determined the number of acres of land owned by the respective parties, which had been under taro cultivation at the time of the Land Commission Award from time immemorial, and thus entitled to appurtenant water rights. Next, the court determined the average quantity of water used per day per acre in growing taro, which it termed

"duty water" to be 50,050 gallons. After the determination of these two factors, the court found that McBryde was entitled to 4,915,400 gallons per day; the State, 4,167,650 gallons; Gay & Robinson (below Koula and Manuahi) 1,533,050; and the other landowners, collectively, 1,456,950.

The trial court also concluded that McBryde by adverse use had acquired prescriptive rights to 2,084,600 gallons, and thereby McBryde could divert seven million gallons of water per day (4,915,400 appurtenant and 2,084,600 prescriptive). Inasmuch as the prescriptive right could not be deemed against the government, the court held that the amount of prescriptive right to water should be deducted from or charged against the water rights of Gay & Robinson.

The record shows that both McBryde and Gay & Robinson are diverting water from the Hanapepe River basin, so much so that the mouth of the Hanapepe River is practically dry throughout the year. Accordingly judgment was entered ordering Gay & Robinson to leave 12,624,600 gallons of water per day in the river for the use of the other owners, as above indicated.

The three principal parties, McBryde, Gay & Robinson, and the State appealed from the judgment each urging different points on appeal.

I. APPLICATION OF TERRITORY *v.* GAY.

The first basic issue before us is whether the trial court was correct in adopting the opinion of Chief Justice Perry in *Terr.* v. *Gay*, 31 Haw. 376 (1930). Gay & Robinson urges that the decision of that case is res judicata as between the State and Gay & Robinson.

The rule of that case is that Gay & Robinson was the owner of the independent ilis[1] or ilis kupono of Koula

[1]An *ili* has been interpreted to mean a "land section, next in importance to ahupuaa and usually a subdivision of an ahupuaa." Pukui & Elbert, *Hawaiian Dictionary* at 91 (1971). See also Jon Chinen, *Original Land Titles in Hawaii* at 51 (1961).

and Manuahi; that under ancient law konohikis[2] of ilis kupono were independent of the konohiki of the ahupuaa[3] and paid no tribute to him; though he was subservient and paid tribute directly to the King, and that as owner of such ilis kupono, Gay & Robinson was owner of the normal surplus water.

Under the doctrine of res judicata "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Glover* v. *Fong*, 42 Haw. 560, 573 (1958).

This doctrine is recognized as a general principle formulated by the judiciary based on the obvious and practical role of reason and necessity to promote justice, fairness, expediency, and social and economic stability in our society. In other words, "[t]his general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination." *Glover* v. *Fong*, *supra* at 574, quoting *Southern Pacific Railroad Co.* v. *United States*, 168 U.S. 1, 49 (1897).

Some courts have held that inasmuch as the doctrine of res judicata is adhered to by the courts as a rule of justice, it should not be applied so rigidly if to do so will be to defeat the ends of justice or to work an injustice. *Greenfield* v. *Mather*, 32 Cal. 2d 23, 194 P.2d 1 (1948); *Universal Const. Co.* v. *City of Fort Lauderdale*, 68 So. 2d 366 (1953); *People* v. *Somerville*, 245 N.E.2d 461, 42 Ill. 2d 1 (1969); *Motor Vehicle Accident Indemnification Corp.* v. *National Grange Mutual Ins. Co.*, 19 N.Y.2d 115, 278 N.Y.S.2d 367 (1967).

[2] *Konohiki* means "a head man of an ahupuaa land division" *id.* at 153, see also Chinen at 53.

[3] *Ahupuaa* means "a land division usually extending from the uplands to the sea . . ." *id.* at 8, see also Chinen at 48.

In spite of such rule enunciated by other courts, we are reluctant to treat the doctrine of res judicata as inapplicable in this case as between the State and Gay & Robinson, even though justice may be subserved. Therefore, we hold that the rule of *Terr.* v. *Gay*, 31 Haw. 376, is binding on the State in this case.

However, as between McBryde and Gay & Robinson, and McBryde and the State, we are not faced with the doctrine of res judicata, and as between these parties, the question is whether we will follow the rule of *Terr.* v *Gay*, 31 Haw. 376, under the doctrine of stare decisis.

We fully discussed and differentiated between these two doctrines in *Glover* v. *Fong*, 42 Haw. at 575 as follows:

> "The doctrine of res judicata is concerned with the adjudication of a cause of action or an issue and the effect of such adjudication in a subsequent action between parties to the record involving the same cause of action or issue. The doctrine of stare decisis relates to the legal principle that may be extracted from an adjudication of a cause of action or an issue and the application of such principle in a subsequent action between strangers to the record involving similar cause of action or issue. * * * When we say parties to the record, we mean persons who were parties in the action in which the adjudication was made; when we say strangers to the record, we mean persons who were not parties in such action.
>
> There is no element of estoppel in the doctrine of stare decisis because it applies only in actions between strangers to the record. If there is a contention in an action between strangers to the record that a principle for which a prior decision stands is erroneous, operates unjustly or against public interest, or is otherwise objectionable, and such contention is well taken, the court which rendered the decision may overrule it. * * * When a decision is overruled, it

> does not mean that the adjudication of the rights and obligations of the parties to the record is nullified; it only means that the legal principle contained in the decision will not be applied in the determination of a cause of action or issue in an action between strangers to the record." (Citations omitted.)

And as the United States Supreme Court said in *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940):

> "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula for adherence to the latest decision * * *."

See also Humthlett v. Reeves, 211 Ga. 210, 85 S.E.2d 25 (1954).

This court, like the United States Supreme Court, has "rejected a doctrine of disability at self-correction." *Helvering* v. *Hallock*, *supra* at 121. We believe that the doctrine of stare decisis is subordinate to legal reasons and justice and we should not be unduly hesitant to overrule a former decision when to do so would bring about what is the considered manifest justice.[4] In other words, there is no necessity or sound legal reason to perpetuate an error under the doctrine of stare decisis. Of course, on the other hand, we should not change a case law just for the sake of a change.

II. STATE OR SOVEREIGN RIGHTS.

In *Terr.* v. *Gay*, 31 Haw. 376, this court concluded that as Gay & Robinson was the owner of Koula and Manuahi, both deemed ilis kupono, and therefore as such

[4]See Yoshizaki v. Hilo Hospital, 50 Haw. 150, 433 P.2d 220 (1967); State v. Abellano, 50 Haw. 384, 441 P.2d 333 (1968).

owner it was also entitled to "normal daily surplus water."

Let us review the three cases which were held in *Terr.* v. *Gay*, *supra* as controlling on the issue of "normal daily surplus water."

In *Peck* v. *Bailey*, 8 Haw. 658, 671 (1867), this court said:

> "While the King owned this Ahupuaa, he had a right to apply the water to what land he pleased, but after the water courses were made, more especially after being in use from time immemorial, his conveyance of the land would include them, the same as his conveyance of land bordering on the Wailuku river will include the rights of water in said river, which had not been before granted."

However, the syllabus or headnote reads: "The owner of an Ahupuaa may apply the water belonging to it to what land he pleases," and this has been held the rule of the case.

Even assuming that it is the rule of the case, it is dictum because the controversy was among grantees of the original konohiki from whom each of them had acquired title to portions of the land in the ahupuaa of Wailuku.

It is stated in *Haw. Com. & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904), that under ancient law "the King was the sole owner of the water as he was the rest of the land and could do with either or both as he pleased. In later years, the rule seems to have been for him not to dispossess tenants of their lands except for cause and to that extent, perhaps, he would not have deprived cultivators of the water to which their lands were by usage entitled. But no limitation, as far as we can learn, ever existed or was supposed to exist to his power to use the surplus waters as he saw fit." We believe the statement correctly states the law under ancient Hawaiian law.

Based on this premise, the *Haw. Com. & Sugar Co.* case concluded that surplus water was the property of the konohiki or chief to whom an ahupuaa had been maheled[5] and he could do with it as he pleased. This also was dictum as the controversy involved in the case was between owners of portions of an ahupuaa and did not involve the rights of konohiki against rights of others with lesser water interest.

In *Carter* v. *Territory*, 24 Haw. 47, 70 (1917), this court said "[w]here a stream flows through a single *ahupuaa* it has been decided that as between the *ahupuaa* and *kuleanas*[6] therein, or portions of the *ahupuaa* conveyed without rights to surplus water, the surplus waters of the stream belong to the *ahupuaa*."

On the issue as to the rights of parties in the surplus waters of a stream which flows from one ahupuaa into another, this court applied the principle of riparian rights and said "each *ahupuaa* is entitled to a reasonable use of such water, first, for domestic use upon the upper *ahupuaa*, then for the like use upon the lower *ahupuaa*, and, lastly, for artificial purposes upon each *ahupuaa*, the upper having the right to use the surplus flow without diminishing it to such an extent as to deprive the lower of its just proportion under existing circumstances." *Carter* v. *Territory, supra* at 70. Of course in that case the only issue related to storm and freshet water claimed by the plaintiff as against the state. However, it is too restrictive to say that the rule was only to be applicable to storm and freshet water and would not be applicable to normal surplus water.

This court in *Terr.* v. *Gay, supra*, reasoned that as

[5]The term *mahele* means to divide or apportion. Pukui & Elbert, *Hawaiian Dictionary* at 202. See also Chinen, *Original Land Titles in Hawaii* at 55. When used in the context of land titles, reference is usually to the Great Mahele of 1848, which accomplished the division of the undivided interest in land between the King on one hand and the chief and konohikis on the other. Chinen at 7; Wells H. Hutchins, *The Hawaiian System of Water Rights* at 23 (1946), see page 10, infra.

[6]*Kuleanas* are small parcels of land within an ahupuaa. Pukui & Elbert at 165; Chinen at 54.

the three cases aforementioned had held generally that konohikis of ahupuaa were entitled to surplus water, therefore, a konohiki of an ili kupono, which ili was independent of the ahupuaa and owed no tribute to the konohiki of the ahupuaa was likewise entitled to normal daily surplus water. In reaching this conclusion it stated that a konohiki of an ili of an ahupuaa which was a mere part of or a subdivision of the ahupuaa, owed tribute to the konohiki of the ahupuaa. On the other hand, a konohiki of an ili kupono, which was independent of the ahupuaa, owed no tribute to the konohiki of the ahupuaa, but "was subservient directly to the king." (p. 381) However, even assuming these factors, under the reasoning in *Terr.* v. *Gay, supra,* both the konohikis of the ilis of Manuahi and Koula would be subservient to the konohiki of the ahupuaa of Hanapepe, he being the King himself, the ahupuaa of Hanapepe having been retained by the King as Crown land. Thus, it would not follow that the ilis of Manuahi and Koula were independent of the ahupuaa of Hanapepe, which may have been so if the konohiki of the ahupuaa of Hanapepe had not been the King himself.

Also, the ahupuaa of Hanapepe is a very large tract of land abutting or adjoining the Hanapepe River. It would be very foolish to say the least, for the King who retained the ahupuaa of Hanapepe to convey or transfer his rights as King to all surplus water to the konohikis of the ilis "kupono" of Koula and Manuahi. Thus, in the absence of such expressed intent, it should not be deemed that the King by the mahele transferred his right to the surplus water, and therefore it should be held that the mahele of Koula and Manuahi and the subsequent Land Commission Award and issuance of Royal Patent did not transfer the King's right to surplus water.

Further, the finding that the ili of Koula was an ili kupono is not substantiated by the record. The mahele record shows that one half of Koula was maheled to

Paniani and one half of Koula was retained by the King on February 1, 1848. Subsequently by Act of June 7, 1848, one half of Koula was designated as public land, a change from Crown land. It is clear to us that the designation of "½ of Koula ili no Hanapepe"[7] shows that at least one half of Koula was not intended to be an ili kupono and therefore independent of the ahupuaa of Hanapepe, but a part of or a subdivision of Hanapepe. Thus, when one half of Koula was conveyed by the Hawaiian government on May 30, 1853 by Royal Patent Grant 1108, such conveyance of an ili of Hanapepe should not have made the whole of Koula an ili kupono, even assuming one half of Koula had been maheled to Paniani as an ili kupono. Thus, the State would be entitled to one half or so much of the surplus of the Koula Stream, as owner of the ahupuaa of Hanapepe, of which one half of Koula was a part.

More importantly, can it be said that because the King was the sole owner of all the land in the Hawaiian Kingdom and also sole owner of the water, which is considered part of the land, and because he could do whatever he wanted with surplus water, when he conveyed parcels of land to konohikis, such right of the King to surplus water became the property of konohikis as intimated in the dicta of this court in *Peck* v. *Bailey*, 8 Haw. 658 (1867), and *Haw. Com. & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904)? To answer this question it is required that we review the Great Mahele and the laws which implemented the mahele.

By the mahele or Great Mahele,[8] Kamehameha III in

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[7]Act of June 7, 1848, L. 1848, p. 22; C.C. p. 374 R.L.H 1925, Volume II, Appendix, p. 2152, 2174, Koula is designated to wit: "½ of Koula, ili no Hanapepe" (meaning ½ of Koula, ili of the ahupuaa of Hanapepe).

[8]Prior to the mahele the King permitted chiefs, etc., to use certain parcels of his land. "In 1839, a course of lectures on the science of government was delivered by the Rev. William Richards to the chiefs at their request and in the same year [June 7, 1839] the Declaration of Rights, aptly called Hawaii's *Magna Carta* was adopted securing all rights of person and property." Frear, J. *The Evolution of the Hawaiian Judiciary*, pp. 5, 8 (1894).

1848 proclaimed that he was sharing the lands in the Hawaiian Kingdom with his people. It is generally recognized that the mahele did not transfer title to parcels of land which had been maheled. The Land Commission Act[9] has implemented the mahele. This Act created the Board of Land Commission, often called the Land Commission, to quiet land titles and it defines the authority and function of the Land Commission. The object of the law was to have the commission make "investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired" in the Hawaiian Kingdom. The awards of the commission were to be deemed final and binding upon all parties unless appealed.

To carry out its duties the Land Commission on August 20, 1846, adopted principles to be followed by it in quieting title to land. Both the Nobles and Representatives in the Legislative Council on October 26, 1846[10] approved the principles by resolution. The resolution also provided that "all claims for landed property • • • shall be tested by those principles, and according to them be confirmed or rejected."

As indicated in these acts, the object and duty of the Land Commission was either to confirm or reject claims of individuals to parcels of land in the Hawaiian Kingdom and title to land so confirmed was to be conveyed by Royal Patent issued by the Minister of Interior.[11]

The principles specifically and most emphatically indicated that the Land Commission was only authorized

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[9]This law was enacted on December 10, 1845 and became effective on February 7, 1846; Laws 1846, p. 107 and appears in R.L.H. 1925, Vol. II, Apendix, p. 2120. The power of the Land Commission was extended from time to time. L. 1848, p. 46, CC. 1859, p. 402; L. 1853, p. 26, CC. 1959, p. 410; L. 1854, p. 21, CC. 1959, p. 415; L. 1854, p. 25, CC. 1959, p. 416; L. 1892, p. 68.

[10]L. 1847 at 81, RLH 1925 (Appendix, Vol. II) at 2124 ff. The provisions also provided for the confirmation of titles to land under Declaration of Rights, June 7, 1839.

[11]L. 1846 at 107, RLH 1925 (Appendix, Vol. II) at 2120, 2123.

to convey certain of the King's rights in land which had been bestowed upon individuals by him, to wit:

> "[H]is private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands are the following:
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> • • • •
>
> "3rd. To encourage and even to enforce the usufruct of lands for the common good * * *."
>
> • • • •
>
> "These prerogatives, power and duties, his Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board and titles consequent upon them must be understood subject to these conditions." L. 1847, 85; RLH 1925, Vol. II, p. 2124, 2128.

We believe that the right to water is one of the most important usufruct of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants.[12]

Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not trans-

[12]It should be noted here that the leaders of the Hawaiian Kingdom were cognizant of the common law rule at the time of the enactment of the principles adopted by the Land Commission in 1845. This is indicated in the first case of Wood v. Stark reported in the Hawaiian Reports, 1 Haw. 9 (1847), wherein it also mentioned Blackstone and Kent commentaries.

Also, in Blackstone, De Luxe Edition, it is stated at 732:

"Land.—Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath."

3 Kent's Comm. 401 "corporeal hereditaments are confined to land, which according to Lord Coke includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings."

ferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good. Therefore, we hold that as between the State and McBryde, and between McBryde and Gay & Robinson, the State is the owner of the water in the Koula Stream and Hanapepe River.

It appears that this Act was very similar to the English common law rules which had evolved by that time, that no one may acquire property to running water in a natural watercourse; *that flowing water was publici juris;* and that it was common property to be used by all who had a right of access.to it, as usufruct of the watercourse.[13] *See Mason* v. *Hill*, 5 Barn. & Adol., 110 Eng. Rep. 692 (1833).

III. APPURTENANT RIGHTS.

The foregoing holding does not mean that McBryde and Gay & Robinson are not entitled to the use of water

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[13]In *Wood v. Waud*, 3 Exc. 748, 154 Eng. Rep. 1047, 1058 (1849), the English court stated:

"Flowing water, as well as light and air, are, in one sense, 'publici juris.' They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of soil belonging to him; the property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it.

The law is laid down by Chancellor Kent, in 3 Com. 439, thus: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water. . . . He has no property in the water itself, but a simple usufruct as it passes along.' 'Aqua currit, et debet currere,' is the language of the law; and Mr. Justice Story in *Tyler* v. *Wilkinson* (4 Mason U.S.R. 397), cited in Gale and Whatley on Easements, p. 131, lays down the same law."

Also, in *Embrey* v. *Owen*, 6 Exc. 353, 155 Eng. Rep. 579, 585 (1851), the English court held that:

"[F]lowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose

in the Koula Stream and Hanapepe River. It is the general law of this jurisdiction that when land allotted by the Mahele was confirmed to the awardee by the Land Commission and/or when Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing. *Peck* v. *Bailey*, 8 Haw. 658, 661 (1867); *Wailuku Sugar Co.* v. *Widemann*, 6 Haw. 185 (1876); *Haw. Com. & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 691 (1904). And it would appear that the trial court only determined the appurtenant rights of the various owners of land in the Hanapepe Basin.

In its determination, the trial court found each party's "appurtenant water rights" by calculating the number of acres of land owned by the respective parties which had been under taro cultivation at the time of the Land Commission Award, and by multiplying the number of acres by the average quantity of water used per day per acre in growing taro, which the court found to be 50,050 gallons. Both McBryde and the State argue that the trial court failed to include certain acreage which they claim was in cultivation of taro from "time immemorial" at the time of the Land Commission Awards. They also claim that reduction of taro acreage by one third to account for fallowing was an error. The trial court's determination of the amount of acreage in taro cultivation at the time of the awards was necessarily a complex factual issue and a very difficult task, requiring weighing of conflicting expert testimony.

The trial court's task, sitting as Commissioner of Private Ways and Water Rights,[14] was to determine as precisely as possible the amount of water that was actually being used for taro cultivation at the time of the Land

to abstract from the stream and take into his possession, and that during the time of his possession only: see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

[14]See HRS § 664-31 et seq.

Commission Awards. The burden of proof was on the person asserting the right. The fact that in earlier or later times other land was in taro cultivation is irrelevant. And a reduction for fallowing should properly be made when it appears that at the time of the Land Commission Awards water was not being used to cultivate certain acreage.[15] Also, due to the difficulty and complexity of the task it would be reasonable to expect parties not favored by the findings of the trial court to attack such findings.

The Circuit Court sitting as commissioner, pursuant to HRS Ch. 664, Part III, is subject to Hawaii's Rule of Civil Procedure because such proceeding is not excepted under HRCP Rule 81 (a). Here, after a review of the record, we are not convinced that a mistake has been committed. *Peine* v. *Murphy*, 46 Haw. 233, 238, 377 P.2d 708 (1963); *Klein Inc.* v. *Hotel Kaimana*, 51 Haw. 268, 269, 457 P.2d. 210, 211 (1969). Thus, under HRCP Rule 52(a) the finding of the trial court as to appurtenant water rights is not clearly erroneous and therefore it may not be set aside.

Therefore, we affirm the trial court's finding that McBryde is entitled to 4,915,400 gallons of water per day; the State, 4,167,650 gallons per day; and Gay & Robinson, 1,533,050 gallons per day for 30.63 acres of land that it owned below Koula and Manuahi as appurtenant water rights.

The court found that Gay & Robinson was also entitled to appurtenant water rights to 90 acres of land in Koula and Manuahi based on Judge Cristy's statement in Equity 2911, First Circuit Court, appealed and reported as *Terr.* v. *Gay*, 31 Haw. 376 (1930). No such finding was made in that case and it was not necessary

[15]It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible. Nevertheless, this is the law in Hawaii, and we are bound to follow it. We invite the legislature to conduct a thorough re-examination of the area.

to make such a finding because the sole issue was the ownership of the "daily normal surplus waters." As to the claim of appurtenant water rights, Gay & Robinson had the burden of proof, but no evidence was introduced by Gay & Robinson to meet this burden. The failure of Gay & Robinson to meet this burden is also acknowledged in the Findings of Facts and Conclusions of Law (item 64), wherein it is stated:

> "Gay & Robinson is also entitled to appurtenant water rights for 90 acres of land in Koula and Manuahi, *the quantity of which can not be determined in the absence of evidence as to the duty of water.*" (Emphasis added.)

Thus, the finding of the trial court as to appurtenant water rights of 90 acres of land in Koula and Manuahi is reversed and set aside.

There is no question that appurtenant water right to taro land attached to the land when title was confirmed by the Land Commission Award and title conveyed by the issuance of Royal Patent. However, it does not follow that because McBryde is entitled to 4,915,400 gallons and Gay & Robinson to 1,533,050 gallons as appurtenant water rights to parcels of land owned by each of them in the Hanapepe Valley, they may therefore divert and transport that amount of water without the Hanapepe Valley to be used on other parcels of land owned by them elsewhere. As the use of the word "appurtenant"[16] indicates, it is water rights which pertain to or annexed to that particular parcel of land conveyed by the original

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[16]Webster's Third New International Dictionary: "appurtenant 1 a: annexed or belonging legally to some more important thing (a right-of-way to land or building); b. Incident to and passing in possession with real estate—used of certain profits or easements . . ."

Black's Law Dictionary, Revised Fourth Edition: "Appurtenant. Belonging to; accessory or incident to; adjunct, appended, or annexed to."

Words & Phrases—"Appurtenances as used with reference to conveyance of realty, means and includes all rights and interest in other property necessary for the full enjoyment of the property conveyed."

grant from the King or Hawaiian government. *Peck* v *Bailey*, 8 Haw. 658, 661 (1867); *Wailuku Sugar Co.* v. *Widemann*, 6 Haw. 185 (1876); *Haw. Com. & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 691 (1904).

We hold that the right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled. Thus, neither McBryde nor Gay & Robinson may transport water to another watershed, which they may have the right to use under their respective appurtenant water rights.

IV. RIPARIAN RIGHTS.

McBryde, the State, and Gay & Robinson, as owners of land in the Hanapepe Valley, may have water rights other than appurtenant water rights. This court in *Terr.* v. *Gay*, 31 Haw. 376, 395 (1930), recognized such a right and said:

> "Water for domestic purposes on a lower ahupuaa is in any event assured under Hawaiian law. Every portion of land, large or small, ahupuaa, ili or kuleana, upon which people dwelt was, under the ancient Hawaiian system whose retention should, in my opinion, continue unqualifiedly, entitled to drinking water for its human occupants and for their animals and was entitled to water for other domestic purposes. At no time in Hawaii's judicial history has this been denied."

This court recognized and included this right to water for domestic purposes as part of the ancient appurtenant rights.

Now, what is this Hawaiian law or ancient Hawaiian system mentioned in the decision? This acknowledgment of the right to domestic water, we believe, was a recognition of the right guaranteed in "Enactment of

Further Principles," enacted by the Hawaiian Government on August 6, 1850, Laws 1850, p. 202,[17] the pertinent portion of which provides:

> "The people [meaning owners of land] also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use."

Section 577 of RLH 1925, the effective statute then, contained the provision guaranteeing the right "to drinking water and to running water." It is crystal clear that the statute reserves to land owners the right to both "drinking water" and "running water." Now, what is the right to "running water" guaranteed landowners? As the right to "drinking water and running water" in artificial watercourses constructed by individuals for their own use is excepted by the statute, the term "running water" must mean water flowing in natural watercourses, such as streams and rivers. We also believe that the right to "running water" as contained therein guarantees a land owner the same flow of water in a stream or river as at the time of the mahele, without substantial diminution, or the right to flow of a stream in the form and size

[17] The entire Act appears in RLH 1925 (Appendix, Vol. II) at 2141, 2142. A portion of this statute has been on our books since its original enactment and now appears as HRS § 7-1 and reads:

> "Building materials, water, etc.; landlords' titles subject to tenants' use. Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use."

given it by nature. This right may be in connection with his right of laundering, canoeing, swimming, bathing, etc.

We shall next consider the possible reason for the enactment of the law. We are aware that the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts. Also, history shows that missionaries had tremendous influence among the leaders of the Hawaiian Kingdom.[18]

In *Weston* v. *Alden*, 8 Mass. 136 (1811) the Massachusetts Supreme Court recognized the right of an owner of a parcel of land adjoining a brook to use water from such brook for domestic use, including the watering of animals and irrigation of his land. Then, in *Colburn* v. *Richards*, 13 Mass. 420, 421 (1816), the Massachusetts court held that an owner of a parcel of land adjoining a natural watercourse had the right to use the water to irrigate his farm; however, it also held that he could not divert such water from the natural channel to the detriment of an owner of land below. In *Anthony* v. *Lapham*, 22 Mass. 175, 177 (1827), the Massachusetts court said "[e]very man, through whose land water passes, may use it for watering his cattle or irrigating his land, but he must use it in this latter way so as to do the least possible injury to his neighbor who has the same right." It is interesting to note that on this point the court as footnote 1 refers to 3 Kent's Commentaries (13th ed.) 439, 444.

In 3 Kent's Commentaries (13th ed.) 439, it is stated:

> "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without

[18] See footnote 8.

diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debt currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above * * *."

In *Tyler* v. *Wilkinson*, 4 Mason 397, 400 (1827), in a case involving water rights of the Pawtucket River, which forms a boundary between the States of Massachusetts and Rhode Island, Justice Story stated:

"*Prima facie* every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed *usque filum aquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current,

flow to a proprietor below, or to throw it back upon a proprietor above. . . . The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows . . . . There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. . . . The maxim is applied, *sic utere tuo, ut non alienum laedas.*"

In *Wright* v. *Howard*,[19] 1 Simons & Stuart 190, 203 (1823), the English Chancery Court said:

"*Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above."

Mason v. *Hill*, 5 Barn. & Adol. 110 Eng. Rep. 692 (1833), is a case where the issue was whether the defendants by diverting water, for a period of less than twenty years, had acquired right to the water by first appropriation so that the plaintiff who had been denied flow of

[19] It is interesting to note the similarity of the courts' holding, 3 Kent Commentaries at 439 and Tyler v. Wilkinson, *supra*, which are all contemporaneous.

water in a natural watercourse which flowed through his field could recover damages. The English court said "2 Blackstone's Commentaries, p. 18 'Water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it.'" (p. 700) Then it said:

> "From these authorities, it seems that the Roman law considered running water, not as a bonum vacans, in which any one might acquire a property; but as public or common, in this sense only, that all might drink it, or apply it, to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only.
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> We think that no other interpretation ought to be put upon the passage in Blackstone, and that the dicta of the learned Judges above referred to, in which water is said to be publici juris, are not to be understood in any other than this sense; and it appears to us there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein." 110 Eng. Rep. 692 at 701.

In *Embrey* v. *Owen*, 6 Exc. 353, 155 Eng. Rep. 579 585 (1851) the English court said:

> "The right to have the stream to flow in its natural state without diminution or alteration is an incident

to the property in the land through which it passes; but flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

The court also said that the principle of law was established by *Wright* v. *Howard*, *supra*, *Mason* v. *Hill*, *supra*, *Wood* v. *Waud*, *supra*, and cases decided by American courts. It also cites 3 Kent's Commentaries 439-445.[20]

In *Miner v. Gilmour*, XII Moore P.C. 131, 14 Eng. Rep. 861, 870 (1858), a case from Canada involving claims of water rights between owners of property on the opposite banks of a river, the English court in applying the doctrine of riparian rights said "[i]t did not appear that, for the purposes of this case, any material distinction exists between the French and English law."

It would appear that in the light of history and historical background of the Hawaiian Kingdom, the provision of the law enacted in August 6, 1850 which reserves to property owners the "right to drinking water and running water," was a codification or statutory enactment of the doctrine of riparian rights recognized as part of the common law by the English and Massachusetts courts.[21]

We therefore hold that under the statute a proprietor

[20]Then at page 586 it quotes extensively from 3 Kent's Commentaries, 13th ed., at 439, in fact the entire section on Running Water excepting the first paragraph. The quotation which appears there is the same as the text in 3 Kent's Commentaries, 13th ed.

[21]On this point it should be noted that the rule of McNaughten's Case, 10

of land adjoining natural watercourses has riparian water rights. Thus, McBryde, the State, and Gay & Robinson, as owners of parcels of land adjoining the Hanapepe River or Koula Stream have such rights — the right to use water flowing therein without prejudicing the riparian rights of others and the right to the natural flow of the stream without substantial diminution and in the shape and size given it by nature. This right is incapable of measurement into number of gallons per day. Of course, the riparian right appertains only to land adjoining a natural watercourse for its use.

V. PRESCRIPTIVE RIGHTS

The trial court also found that McBryde was entitled to 2,084,600 gallons of water per day by adverse or prescriptive use. The general law is that one may not claim title to or interest in state-owned property by adverse use. *Re Land Title, State of Hawaii*, 49 Haw. 537, 552, 425 P.2d 83, 92 (1967); *In re Title of Kioloku*, 25 Haw. 357, 367 (1920); *Terr.* v. *Puahi*, 18 Haw. 649 (1908). Recognizing that prescription could not run against the government, the trial court held that McBryde's prescriptive right to water should be deducted from or charged against the water rights of Gay & Robinson. We believe this was error — if McBryde had been prescribing large amounts of water, the trial court should have ordered McBryde to cease prescribing the State's portion, not impose a double burden on Gay & Robinson by having the amount of water used by McBryde charged against Gay & Robinson. However, the issue is academic now since under our holding that the ownership of water flowing in the Koula Stream and Hanapepe River being in the State, as between McBryde and the State, McBryde acquired no prescriptive right to water.

Clark & Fin. 200, 210, 8 Eng. Rep. 718 (1843), which recognized insanity as a defense in a criminal case, was codified in the Hawaiian Kingdom in 1850. See HRS § 703-4.

VI. "NORMAL DAILY SURPLUS WATER"

In *Terr.* v. *Gay*, 31 Haw. 376 (1930) it was decided that Gay & Robinson was entitled to "normal daily surplus water."[22] That decision was based upon the assumption that there would be a quantity of water which may be deemed "normal daily surplus water" after the water rights of all the owners of land in the Hanapepe Valley were determined; however, at that time, no determination as to the water rights of any of the owners of parcels of land in the Hanapepe Valley had been made. In a sense, the decision was made in a vacuum. Both the State and McBryde owning land abutting the Hanapepe River are entitled to riparian water rights over and above the appurtenant rights as determined by the trial court, and under the riparian doctrine they are entitled to the amount of flow of water in both the Koula Stream and Hanapepe River as water flowed in the stream and river at the time of the award without substantial diminution. In other words, they are entitled to have the flow of water in the Hanapepe River in the shape and size given it by nature. Thus, there can be no quantity of water which may be deemed "normal daily surplus water," and Gay & Robinson is entitled to nothing under the ruling of that case.

Also, Gay & Robinson may not claim the right to appropriate water adverse to the State's riparian and appurtenant rights because one may not claim interest in or title to State property, or right or interest by adverse use.

VII. RIGHTS TO "STORM AND FRESHET" WATER

We reiterate our holding under point II that title to water was reserved to the State for the common good

[22]This question was the sole issue decided by the trial court and the Hawaii Supreme Court.

when parcels of land were allotted to the awardee under the mahele. Thus "storm and freshet" water is the property of the State and we overrule *Carter* v. *Hawaii*, 24 Haw. 47 (1917).

VIII. SUMMARY

1. As between the State and McBryde, and McBryde and Gay & Robinson, the State is the owner of the water flowing in the Koula Stream and Hanapepe River. However, the owners of land, having either or both riparian or appurtenant water rights, have the right to the use of the water, but no property in the water itself.

2. The State, McBryde and Gay & Robinson have both appurtenant and riparian rights to water in connection with land within the Hanapepe Valley. However, under claim of such rights, neither McBryde nor Gay & Robinson may transport water to another watershed.

3. Under the doctrine of riparian rights, owners of land adjoining a natural watercourse have the right to a flow of a river or stream in the shape and size given it by nature. Thus, under such right there can be no "normal daily surplus" water.

4. McBryde has no prescriptive right to water, as no one may claim title or interest against property owned by the State.

5. "Storm and freshet" water is the property of the State.

Neither McBryde nor Gay & Robinson has any right to divert water from the Koula Stream and Hanapepe River out of the Hanapepe Valley into other watersheds.

Affirmed in part; reversed in part.

J. Russell Cades and *Robert B. Bunn* (*Cades Cox Schutte Fleming & Wright* of counsel) for plaintiff-appellant, cross-appellee.

J. Garner Anthony and *John H. R. Plews* (*Anthony*

& Waddoups of counsel) for defendants-appellees, cross-appellants.

Andrew S. O. Lee, Deputy Attorney General (*Bert Kanbara*, Attorney General, with him on the briefs), for State of Hawaii, defendant-appellee, cross-appellant.

DISSENTING AND CONCURRING OPINION OF MARUMOTO, J.

I dissent from the decision set forth in the last paragraph of the foregoing opinion of the court that neither Gay & Robinson nor McBryde has any right to divert the water flowing in Koula Stream and Hanapepe River to watersheds beyond the Hanapepe valley.

That decision has no relation whatsoever to the judgment appealed from in this case, and is neither within the issues raised and tried in the circuit court nor within the questions presented and argued to this court.

In the following statement of my view of the case, I will refer to the opinion of the court in this case as the majority opinion; the majority of the justices sitting in the case as the majority; the discussion of my view as the dissent, although it contains my concurrence with the majority on some matters; Gay & Robinson as G&R; and the numbered subparagraphs of Paragraph VIII of the majority opinion as items 1, 2, 3, 4, and 5.

There are two cases in the Hawaii Reports which are related to this case. They are *Territory* v. *Gay*, 25 Haw. 651 (1920), 26 Haw. 382 (1922); and *Territory* v. *Gay*, 31 Haw. 376 (1930), 52 F.2d 356 (9th Cir. 1931), *cert. denied* 284 U.S. 677 (1931). I will refer to the earlier case as *Gay* I, and the later case as *Gay* II.

This case is a sequel to *Gay* II, which was, in turn, a sequel to *Gay* I, and represents the final phase of the controversy regarding the rights of various parties to the water originating on the lands of Koula and Manuahi,

which has been in litigation for more than one-half of a century since the filing of *Gay* I.

The principal parties to the controversy at the present time are the State, G&R, and McBryde.

The State stands in the place of the Territory, as the successor in interest of the konohiki of the ahupuaa of Hanapepe, within which the ilis kupono of Koula and Manuahi are located.

G&R is the successor in interest of the konohiki of the ilis kupono of Koula and Manuahi.

McBryde is the owner of the ilis kupono of Eleele and Kuiloa, and certain kuleanas downstream in the Hanapepe valley, which are entitled to take appurtenant water from Hanapepe River.

In *Gay* I, the Territory challenged the ownership by G&R of a major portion of the land of Koula.[1] A decision in favor of the Territory would have placed the challenged portion in the ahupuaa of Hanapepe. The Territory then would have been the owner of the surplus water of that portion of the land under the prior decisions of this court which recognized the surplus water of a stream having its source in an ahupuaa as belonging to the konohiki of the ahupuaa.

This court determined the entire land of Koula to be an ili kupono belonging to G&R. There has never been any challenge to the title of G&R to the ili kupono of Manuahi. Thus, at this date, there can be no question regarding the ownership by G&R of the lands of Koula and Manuahi.

In *Gay* II, the Territory, having lost in *Gay* I, challenged the ownership by G&R of the surplus water of Koula Stream and Manuahi Stream.

The vehicle which the Territory used in the challenge was an equity suit to enjoin G&R from diverting

[1]The land of Koula contains 5,520 acres, covered by Grant 1108 and Royal Patent 698 issued to the predecessors in title of G&R. Grant 1108 covers a portion containing 740 acres in the lower corner. The Territory did not challenge the ownership by G&R of that portion.

the surplus water of the two streams to the arid lands of Makaweli. However, the right of the owner of the water, whether it be the Territory or G&R, to divert it from the watershed of origin to other watersheds was not made an issue in the case. The Territory rested its case solely on the contention that ilis kupono are of a less degree of dignity than an ahupuaa and that the primary right to the water arising in such ilis is in the owner of the ahupuaa in which the ilis are located.

It is obvious that the right of the owner of the water to divert it from the watershed of origin to other watersheds was not raised as an issue in the case for the reason that the existence of such right was deemed to be a closed question under the prior court decisions going back to *Peck* v. *Bailey*, 8 Haw. 658 (1867), followed by *Horner* v. *Kumuliilii*, 10 Haw. 174 (1895), *Wong Leong* v. *Irwin*, 10 Haw. 265 (1896), and the Wailuku River cases litigated in *Lonoaea* v. *Wailuku Sugar Co.*, 9 Haw. 651 (1895), and *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar* Co., 14 Haw. 50 (1902), 15 Haw. 675 (1904), 16 Haw. 113 (1904). *Peck* v. *Bailey* sanctioned a diversion of water from one portion of an ahupuaa to another portion of the same ahupuaa; *Horner* v. *Kumuliilii* a diversion from one kuleana to other kuleanas; and *Wong Leong* v. *Irwin* a diversion from one ahupuaa to other ahupuaas.

The circuit court limited its decision to the normal daily surplus water of Koula Stream and Manuahi Stream, finding that there was no attempt by G&R to appropriate the storm and freshet water of the streams, and entered a decree denying the injunction sought by the Territory.

Upon appeal, this court affirmed the decree in a split decision, the dissenting justice being of the view that the doctrine of riparian right was applicable to the case, both with respect to normal surplus water and storm and freshet water.

I do not think that there can be any question that *Gay* II established the following: (1) the ownership by G&R of the normal surplus water of Koula Stream and Manuahi Stream; and (2) the right of G&R to divert such surplus water to areas beyond the Hanapepe valley.

Gay II is res judicata only as between the State and G&R. However, no party other than the Territory ever challenged the ownership by G&R of the normal surplus water of the two streams. Nor has any party ever questioned the right of G&R to divert such water from the Hanapepe valley to areas outside of the valley.

It appears that one of the principal reasons, if not the only reason, which caused McBryde to institute the instant proceeding was that, after *Gay* II, G&R began diverting the water deemed to be storm and freshet water, and also some of the water deemed to be appurtenant to the lands downstream in the Hanapepe valley, by making changes in the facilities for the diversion of the water to Makaweli, which increased the carrying capacity of such facilities from 40,000,000 gallons per day to 65,000,000 gallons per day.

The issues in this case, raised and tried in the circuit court, were: (1) the quantity of water of Koula Stream and Manuahi Stream to which McBryde is entitled as appurtenant to its lands in the Hanapepe valley; (2) the quantity of such water to which the State is entitled as appurtenant to its lands in the valley; (3) the quantity of such water to which other owners of lands in the valley are entitled as appurtenant to their lands; (4) the quantity of such water which McBryde is entitled to take under a claim of prescriptive right; and (5) the right of G&R, the State, McBryde, and other owners of lands in the valley to the storm and freshet water of Koula Stream and Manuahi Stream. Those also were the issues, and the only issues, presented and argued to this court on the present appeal.

The circuit court made its determinations on the

first three issues, and also a determination of the quantity of water appurtenant to the lands owned by G&R in the Hanapepe valley. Those determinations are set forth in the majority opinion. The majority holds that they were correctly made. I concur in that holding.

On the fourth issue, the circuit court determined that McBryde has a prescriptive right to take 2,084,600 gallons per day, to be charged against the surplus water which G&R is entitled to retain and divert. The majority holds, in item 4, that McBryde does not have such prescriptive right. I concur in that holding also, but not for the reason given therefor in item 4.

I think that McBryde has no prescriptive right because its taking was not adverse to the right of G&R to the normal surplus water of Koula Stream and Manuahi Stream. McBryde's intake points are below the diversion point of G&R. In the establishment of prescriptive right to water, adverse use does not run upstream. *Wellsville East Field Irrigation Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634 (1943); *Day* v. *Hill*, 241 Ore. 507, 406 P. 2d 148 (1965).

On the fifth and last issue, the circuit court determined that the storm and freshet water of Koula Stream and Manuahi Stream belonged to G&R as part of the surplus water which the owner of the land on which a stream has its source is entitled to appropriate. In item 5, the majority holds that the ownership of storm and freshet water is in the State. I do not concur in that holding; nor do I agree with the determination of the circuit court on the issue.

I would follow *Carter* v. *Territory*, 24 Haw. 47 (1917), on the matter. In that case, this court divided the surplus water of a stream into normal surplus water and storm and freshet water, and held that the doctrine of riparian right was applicable to the latter.

I think that the holding in *Carter* v. *Territory* on storm and freshet water was proper. The right to storm

and freshet water was an issue in the case. But no showing was made therein regarding any Hawaiian usage on the matter. In the situation, the disposition of the issue was governed by the statutory provision presently compiled in HRS § 1-1, which declares the common law of England, as ascertained by English and American decisions, to be the common law of Hawaii, except as otherwise fixed by Hawaiian judicial precedent or established by Hawaiian usage.

The decision set forth in the last paragraph of the majority opinion involves a consideration of the doctrine of res judicata in its effect upon G&R, and a consideration of the principle of stare decisis insofar as it prevents McBryde from diverting the water appurtenant to its lands in the Hanapepe valley for use upon its lands beyond the valley.

The majority professes to recognize in the body of the majority opinion, albeit reluctantly, that *Gay* II is res judicata between the State and G&R, and holds that it is binding on the State. However, the decision effectively nullifies that holding to the extent that it denies G&R the right to divert the normal surplus water of Koula Stream and Manuahi Stream to Makaweli.

Greenfield v. *Mather*, 32 Cal. 2d 23, 194 P.2d 1 (1948), is cited by the majority for the proposition that the doctrine of res judicata "will not be applied so rigidly as to defeat the ends of justice or important considerations of policy."

I think that res judicata is an imperative, which commands adherence without any exception. I agree with Mr. Justice Traynor, who stated in his dissent in *Greenfield* v. *Mather* that "a departure from res judicata throws into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case"; and with Mr. Justice Edmonds, who stated in his dissent in the same case, as follows: "No doctrine in the law is more funda-

mental and it is vital to the orderly administration of justice. * * * Courts should stand firm against a policy of endless litigation in which nothing is ever decided with certainty."

The principle of stare decisis, which is involved in the portion of the decision which prevents McBryde from diverting the water appurtenant to its lands in the Hanapepe valley for use in other areas does not require strict adherence to prior decisions as in the case of res judicata. Nevertheless, it counsels adherence to precedents, particularly with respect to precedents relating to property rights, on the reasoning that "it is better to adhere to principles once fixed, though, originally, they might not have been perfectly free from all objection, than to unsettle the law, in order to render it more consistent with the dictates of sound reason." Washington, J., *Marine Insurance Co.* v. *Tucker*, 3 Cranch (7 U.S.) 357 (1806).

In deciding that McBryde has no right to divert the water appurtenant to its lands in the Hanapepe valley, the majority deems that the prior court decisions recognizing the right of the owners of water to divert the water from one area to other areas were based upon erroneous legal reasoning, and cites *Helvering* v. *Hallock*, 309, U.S. 106 (1940), in which the court declined to follow a precedent urged to be applicable.

In *Helvering* v. *Hallock* the court stated that it had "from the beginning rejected a doctrine of disability at self-correction," and, further, that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision." However, a careful reading of that case shows that the principle of stare decisis was not followed there because the precedent urged upon the court involved "collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience," and also because the precedent did not contain "rules of decision around

which, by the accretion of time and the response of affairs, substantial interests have established themselves."

I think that in Hawaii, around the prior court decisions sanctioning the diversion of water from one area to other areas, substantial interests have established themselves "by the accretion of time and response of affairs."

The record in this case shows that the water diverted from Koula Stream and Manuahi Stream by G&R is used in irrigating the sugar cane fields of Olokele Sugar Company, Limited, in Makaweli, and that the water diverted from Hanapepe River by McBryde is used in irrigating its sugar cane fields in Lawai and other areas beyond the Hanapepe valley. There is also evidence in the case that, subsequent to the decision in *Gay* II, G&R and Olokele spent approximately $119,000 and $788,800, respectively, on the system for the diversion of the water of Koula Stream and Manuahi Stream to Makaweli, and that McBryde spent $558,000 for pumping equipment in the Hanapepe valley, $226,000 for ditches and siphons to transport the water to its cane fields beyond the valley, and $60,000 for the construction of reservoir to store the water.

Although I do not have specific information at hand, I presume that, besides the parties in this case, there are other segments in the agricultural economy of Hawaii which depend upon irrigation for the cultivation of their crops, have expended substantial sums in constructing irrigation facilities in reliance upon prior court decisions, and will be adversely affected by the decision announced today.

Chief Justice Stone stated in *United States* v. *Southeastern Underwriters Assn.*, 322 U.S. 533, 579 (1944):

> "To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view. But the rule of stare

decisis embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. * * * The question then is not whether an earlier decision should ever be overruled, but whether a particular decision ought to be. And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity."

That statement was made in a dissenting opinion. However, I think that, in a case such as this, it provides a proper guide to follow.

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1969

SPECIAL PROCEEDING NO. 108
APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969
FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, *Judge*

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

MOTION FOR LEAVE TO FILE, AS AMICUS CURIAE, A PETITION FOR REHEARING OR A BRIEF IN SUPPORT OF A PARTY'S PETITION

Comes now HAWAIIAN SUGAR PLANTERS' ASSOCIATION and being advised that McBryde Sugar Company, Limited, Aylmer F. Robinson and others, parties herein, have been granted an extension of time, until May 10, 1973, within which to file petitions for rehearing, hereby moves this Court for leave to file, as amicus curiae herein, a petition for rehearing or a brief in support of a party's petition, on or prior to said date.

The purpose of Movant in filing a petition for rehearing or brief as amicus curiae would be to ask the Court's reconsideration only of its conclusions: (1) that rights to surplus water were not transferred to an awardee by the Great Mahele and subsequent Land Commission Award

and Royal Patent, and (2) that rights to the use of water may be exercised only in connection with the land to which the water was appurtenant or riparian and that owners of water have no right to divert it into other watersheds for use upon other lands.

Movant is gravely concerned with the effect of the decision herein, and with the implementation of the conclusions above mentioned, upon the rights and interests of its member plantations, upon the operation of those plantations and upon the sugar industry in Hawaii. As amicus curiae, Movant would ask that the Court consider facts and legal argument which were not presented to the Court before it reached the conclusions just mentioned.

Movant is not concerned with the measure or quantity of water rights of the parties in the Koula Stream and Hanapepe River and does not seek to be heard with respect thereto, except insofar as the same were ascertained on the basis of the conclusions just mentioned.

This motion is based upon the affidavit and memorandum attached hereto and the records and files of this Court.

DATED: Honolulu, Hawaii, March 29, 1973.

/s/ CLINTON R. ASHFORD

Clinton R. Ashford
6th Floor
235 Queen Street
Honolulu, Hawaii 96813

Of Counsel:

ASHFORD & WRISTON

[Certificate of Service omitted in printing]

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

MCBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

VS.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

No. 4879

MOTION FOR LEAVE TO FILE, AS AMICUS CURIAE, A PETITION FOR REHEARING OR A BRIEF IN SUPPORT OF A PARTY'S PETITION

APRIL 3, 1973

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON, JJ., AND CIRCUIT JUDGE OGATA IN PLACE OF KOBAYASHI, J., DISQUALIFIED

Per Curiam. The motion for leave to file, as amicus curiae, a petition for rehearing or a brief in support of a party's petition is denied without argument.

Marumoto, J., having dissented from the opinion of the court, does not concur.

/s/ WILLIAM S. RICHARDSON
/s/ KAZUHISA ABE
/s/ BERNARD H. LEVINSON
/s/ THOMAS S. OGATA

CLINTON R. ASHFORD
(Ashford & Wriston
of counsel) for movant
Hawaiian Sugar Planters'
Association.

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING No. 108

APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, *Judge*

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, SELWYN A. ROBINSON, ELEANOR ROBINSON and LESTER B. ROBINSON, individually and as copartners doing business under the firm name of GAY AND ROBINSON, DEVISEES OF THE ESTATE OF ALICE ROBINSON, DEVISEES OF THE ESTATE OF SINCLAIR ROBINSON, OLOKELE SUGAR COMPANY, LIMITED, STATE OF HAWAII, et al., *Defendants-Appellees, Cross-Appellants.*

MOTION FOR PARTIAL VACATION OF OPINION OR FOR OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT

OLOKELE SUGAR COMPANY, LIMITED hereby moves this honorable Court to vacate those portions of the decision rendered in this case which deal with property rights and issues not properly before the Court on the ground that failure to do so would deprive Olokele of property without due process of law and result in a taking without compensation. In the alternative, and on the same grounds as

set forth above, Olokele moves this Court to afford it the opportunity to introduce evidence and present argument material to the issues of ownership of normal daily surplus waters and the diversion of waters from the watershed of origin and ancient Hawaiian usage with respect thereto, which evidence was not introduced before the Commissioner nor would due diligence have required its introduction because these questions were not at issue before the Commissioner and did not become issues in the case until raised in this Court's decision. Olokele moves that this Court, after affording an opportunity to present argument and evidence, either enter an opinion which does not reach the issues of the ownership of the normal daily surplus water and the right to transport water out of the watershed of origin, or, if those issues are to be reached, enter an opinion affirming the ownership of Gay and Robinson of the normal daily surplus and its right to transport water out of the Hanapepe watershed to Olokele.

DATED: Honolulu, Hawaii April 13, 1973.

/s/ WILLIAM F. QUINN
William F. Quinn
Attorney for Defendant-Appellee
Olokele Sugar Company, Limited

[Certificate of Service omitted in printing]

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

v.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

No. 4879

MOTION FOR PARTIAL VACATION OF OPINION OR FOR OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT

APRIL 30, 1973

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON, JJ., AND CIRCUIT JUDGE OGATA IN PLACE OF KOBAYASHI, J., DISQUALIFIED

Per Curiam. The motion for partial vacation of opinion or for opportunity to present evidence and argument is denied without argument.

Marumoto, J., having dissented from the opinion of the court, does not concur.

/s/ WILLIAM S. RICHARDSON
/s/ KAZUHISA ABE
/s/ BERNARD H. LEVINSON
/s/ THOMAS S. OGATA

WILLIAM F. QUINN
(Jenks, Kidwell, Goodsill & Anderson of counsel)
for defendant-appellee Olokele Sugar Company, Limited.

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING No. 108

APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, *Judge*

MCBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

v.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

ORDER

Pursuant to the petitions for rehearing filed in this matter, it is hereby ordered that McBryde Sugar Co., Ltd., Aylmer F. Robinson, the State of Hawaii, and other owners represented by Clinton Shiraishi file simultaneous briefs on or before August 15, 1973 directed to the following issues:

1. The pertinent portion of HRS § 7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:

> "The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."

Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?

2. The parties in this action introduced evidence, as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant?

DATED: Honolulu, Hawaii, June 18, 1973.

BY THE COURT:

/s/ WILLIAM S. RICHARDSON
William S. Richardson
Chief Justice

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

MCBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

ORDER

The motion of Olokele Sugar Company, Limited, defendant-appellee, to file a brief directed to the issues outlined by this court in our order of June 18, 1973, having been considered,

IT IS HEREBY ORDERED that said motion be, and it is hereby granted.

DATED: Honolulu, Hawaii, June 29, 1973.

FOR THE COURT:

/s/ WILLIAM S. RICHARDSON
Chief Justice

[SEAL]

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING NO. 108

APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, *Judge*

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

MOTION TO HAVE OFFICIAL REPORTER PRESENT AT ORAL ARGUMENT

Come now McBRYDE SUGAR COMPANY, LIMITED, SELWYN ROBINSON, et al. and OLOKELE SUGAR COMPANY, LIMITED, by their respective attorneys, and move this Honorable Court that it enter an order permitting an official reporter to be present at the oral argument set in this court for Tuesday, September 18, 1973, for the purpose of reporting the proceedings had at the time of the said oral argument.

This Motion is made on the grounds that a record is or may be necessary to protect the rights of the parties in proceedings subsequent to the oral argument of this cause.

This Motion is based on all files and records herein, including the Supplemental Brief filed on August 15, 1973 on behalf of the State of Hawaii.

DATED: Honolulu, Hawaii, this 31 day of August, 1973.

Respectfully submitted,

/s/ J. RUSSELL CADES
Attorney for McBryde Sugar Company, Limited

/s/ JOHN H. R. PLEWS
Attorney for Selwyn F. Robinson, et al.

/s/ WILLIAM F. QUINN
Attorney for Olokele Sugar Company, Limited

[Certificate of Service omitted in printing]

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING NO. 108

APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, *Judge*

MCBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

v.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

ORDER DENYING MOTION

The motion to have an official reporter present at the oral argument set in this court for Tuesday, September 18, 1973, filed August 31, 1973 by the attorneys for McBryde Sugar Company, Limited, Aylmer F. Robinson, et al., and Olokele Sugar Company, Limited, is hereby denied.

DATED: Honolulu, Hawaii, September 5, 1973.

BY THE COURT:
/s/ WILLIAM S. RICHARDSON
Chief Justice

[SEAL]

Syllabus

McBRYDE SUGAR COMPANY, LIMITED, Plaintiff-Appellant, Cross-Appellee, *v.* AYLMER F. ROBINSON, et al., Defendants-Appellees, Cross-Appellants.

NO. 1879

APPEAL FROM FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, JUDGE
ON REHEARING

DECEMBER 20, 1973

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON, JJ., AND CIRCUIT JUDGE OGATA IN PLACE OF KOBAYASHI, J., DISQUALIFIED

Per Curiam. Subsequent to the filing of the decision in this case on January 10, 1973 (54 Haw. 174, 504 P.2d 1330 (1973)), petitions for rehearing were filed by some of the parties. By order of this court dated June 18, 1973, all the parties were requested to file supplementary briefs directed to the issues (1) whether HRS § 7-1[1] was material to the determination of the water rights of the parties, and (2) whether owners of parcels of land in the Hanapepe Valley, who were entitled to appurtenant water rights for taro raising at the time of the Mahele or the Land Commission Award, were entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant.

Arguments of the parties were heard at the rehearing had on September 18, 1973. After careful consideration of the briefs and arguments presented at the rehearing, we find no reason to change the decision filed herein.

J. Russell Cades and *Robert B. Bunn (Cades, Schutte, Fleming & Wright* of counsel) for McBryde Sugar Co., Ltd., plaintiff-appellant, cross-appellee.

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[1] The pertinent portion of HRS § 7-1 reads:

". . . . The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."

John H. R. Plews (*Anthony, Hoddick, Reinwald & O'Connor* of counsel) for Selwyn A. Robinson, et al., defendants-appellees, cross-appellants.

Andrew S. O. Lee, Deputy Attorney General (*George Pai*, Attorney General, of counsel) for State of Hawaii, defendant-appellee, cross-appellant.

William F. Quinn (*Goodsill, Anderson & Quinn* of counsel) for Olokele Sugar Co., Ltd., defendant.

Clinton Shiraishi (*Shiraishi & Yamada* of counsel) for Ida Albarado, et al., petitioners.

DISSENTING OPINION OF MARUMOTO, J.

This phase of the case is limited to two points mentioned in the foregoing per curiam, the points being: first, whether HRS § 7-1 was material to the determination of the water rights of the parties, and, second, whether the landowners in Hanapepe Valley, who were entitled to appurtenant water rights, had the right to divert such appurtenant water to watersheds beyond the Hanapepe Valley.

I discussed my view on the second point in my dissent reported at 54 Haw. 201, 504 P.2d 1356, and it is the view presented in the supplementary briefs with more elaboration.

I did not discuss the first point in my dissent, for the reason that I did not think that it was an issue on appeal. However, assuming that it was a proper issue on appeal, I think that HRS § 7-1 does not support the holding of the court in Part II of the opinion of the court at 54 Haw. 180, 504 P.2d 1335, that it reserved the title to flowing water to the State for the common good. On the point, I concur in the historical analysis in the dissenting opinion of Mr. Justice Levinson.

DISSENTING OPINION OF LEVINSON, J.

Although I voted with the majority of this court in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973) [hereinafter referred to as *McBryde I*], I am constrained to recant that position in view of my current understanding of the problems of this case. In light of the arguments adduced

on rehearing, historical evidence discovered upon further research subsequent to the court's previous decision in this case, and a reappraisal of the reasoning supporting that decision, it is my opinion that the court committed error in holding that all surplus water belongs to the State and that private water rights, however acquired, may not be transferred to nonappurtenant land. Because of the importance of this case to the development of the law on the subject of Hawaii's water resources, I have undertaken to present a detailed analysis explaining why *McBryde I* is not in keeping with long established and unique principles of Hawaiian water law. Precisely because *McBryde I* is such a radical departure from these principles as they have been heretofore understood, moreover, I have concluded that *McBryde I* effectuates an unconstitutional taking of the appellant's and cross-appellants' property without just compensation and should be reversed on this ground as well.

As Mr. Justice Frankfurter stated in his famous dissenting opinion in *Henslee v. Union Planters National Bank*, 335 U.S. 595, 600 (1949): "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." I regret that the wisdom to correct the errors of *McBryde I* has not come to a majority of this court in time to restore continuity to the body of water law that has evolved in Hawaii over the course of more than a century.

I. THE BACKGROUND OF THE CONTROVERSY

This case arises out of a controversy among owners of land located in the Hanapepe Valley on the island of Kauai respecting their relative rights in the surface waters of the valley.[1] The action commenced on March 24, 1959, when a

[1] The uncontested findings of the trial judge below, sitting as Commissioner of Private Ways and Water Rights under HRS §§ 664-31 to 37, as to the nature of surface waters in the Hanapepe Valley were as follows:

> The watershed of the Hanapepe River is about fifteen miles long and from two to five miles in width. At the upper or north portion the annual rainfall is between 400 and 500 inches. The annual rainfall decreases as the valley goes toward the sea, and at the sea the rainfall is comparatively negligible. The Koula stream joins the Manuahi stream about halfway to the sea to form the Hanapepe River.

McBryde Sugar Co. v. Robinson, S.P. No. 108, Decision at 4 (5th Cir. Ct. of Hawaii, December 10, 1968).

complaint was filed by McBryde Sugar Company, Limited, hereinafter referred to as McBryde, the owner of the *ilis kupono*[2] of Eleele and Kuiloa, situated in the southeastern portion of the valley. The defendants fell into three categories: (1) the Territory (now the State) of Hawaii, the owner of the *ahupuaa* of Hanapepe, located in the southwestern portion of the valley; (2) the partnership of Gay and Robinson and its individual partners, hereinafter referred to as Gay and Robinson, owners of the *ilis kupono* of Manuahi and Koula, located in the northwestern and northeastern portions of the valley, respectively, and; (3) all other owners of the lands in the Hanapepe Valley, hereinafter referred to as Small Owners.

The two principal users of water in the Hanapepe Valley

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[2] The Hawaiian terms *ili kupono*, *ili*, *ahupuaa* and *kuleana* are peculiar to the ancient Hawaiian system of land tenure and were explained as follows in Territory v. Bishop Trust Co., 41 Haw. 358, 361-62 (1956):

> [U]nder the ancient Hawaiian system all land belonged to the king or ruling chief who allotted tracts of land from time to time to the principal chiefs, subject to revocation at will; upon the death of the king each principal chief derived his lands anew, gave them out to an inferior order of chiefs or first of rank, by whom they were subdivided again and again from the king down to the lowest class of tenants.
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> The unit of land was the *ahupuaa*, usually running from the mountains to the sea. Within the *ahupuaa* were a number of subdivisions, each of which was called an *ili* [or *ili* of the *ahupuaa*]. This division was for the convenience of the chief, administered by a *konohiki* or agent appointed by the chief. (It is only in the later statutes that the chiefs or landlords are referred to as *konohikis*.) It had no existence separate from that of the *ahupuaa*, except the so-called *ili ku* [*ili kupono*] or independent *ili*, although the independent *ili* paid tribute to the king. There were also *kuleanas*, meaning a tract of land within the larger tract. The term *kuleana* originally referred to a right of property in any business or other matter but afterwards was applied to the land holding of the tenant or *hoaaina* residing in the *ahupuaa*.

See generally J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, at 1-8 (1958); W. HUTCHINS, THE HAWAIIAN SYSTEM OF WATER RIGHTS 39-42 (1946) [hereinafter cited as HUTCHINS].

On the facts of this case, although it is possible that the *konohiki* of the *ahupuaa* of Hanapepe exercised plenary control over the entire Hanapepe Valley in ancient times, at some point in history the king created fully independent *ilis kupono* within the geographical boundaries of the *ahupuaa*. These *ilis kupono* were of equal rank and dignity with the *ahupuaa* from which they were created, and upon their *konohikis* devolved all the rights and appurtenances customarily associated with the stewardship of such land units on behalf of the king. *See* Territory v. Gay, 31 Haw. 376,378-81 (1930), *aff'd*, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931).

are McBryde and Gay and Robinson, both of which for a long period of time have availed themselves of substantial amounts of the surface waters of the valley for sugar cane irrigation both within and without the Hanapepe watershed.[3] The instant controversy was kindled in 1949 when Gay and Robinson implemented a greatly improved ditch and tunnel system for the transportation of water for irrigation purposes to the lands at Makaweli, a substantial portion of which is cultivated by the Olokele Sugar Company, outside and to the west of the Hanapepe watershed. Although this system enabled Gay and Robinson to appropriate significantly increased amounts of water from the Koula stream, such an increase was to the detriment of downstream landowners such as McBryde who thereafter were unable to take from the Hanapepe River the amount of water they had theretofore been taking.

After an exhaustive trial on the merits, on January 30, 1969 the trial court filed amendments to its decision of December 10, 1968 delineating the rights of the parties with respect to appurtenant water,[4] prescriptive water,[5] normal

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[3] The evidence showed that McBryde had been appropriating water for irrigation at least since 1934, see McBryde Sugar Co. v. Robinson, S.P. No. 108, Decision at 11-12 (5th Cir. Ct. of Hawaii, December 10, 1968), and that Gay and Robinson had been doing so since 1891. *See id.* at 6-7. *See also* Territory v. Gay, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931), *aff'g* 31 Haw. 376 (1930).

[4] Appurtenant water rights have been defined as follows:

> Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the Land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes, that land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named.

Territory v. Gay, 31 Haw. 376, 383 (1930).

[5] As stated by Mr. Hutchins:

> In order to establish a prescriptive title to a water right, there must have been an "actual, open, notorious, continuous and hostile use" of the water for the statutory period of limitations [20 years], and t[he use must also have been made under a claim of right.

HUTCHINS 111; see Territory v. Gay, 31 Haw. 376, 383 (1930); Kohala Sugar Co. v. Wight, 11 Haw. 641, 648-50 (1899).

surplus water,[6] and storm and freshet surplus water[7] in the Hanapepe Valley. The trial court's process of reasoning and conclusions in this regard are reported in *McBryde Sugar Co. v. Robinson*, *supra* at 176-77, 504 P.2d at 1333-34. Integral to the trial court's judgment were two principles of Hawaiian water law, which it considered to be solidly bottomed in Hawaiian judicial precedent and which were unquestioned by any of the parties: (1) that all normal surplus water belongs to the *konohiki* of the *ahupuaa* or *ili kupono* on which it originates, *see, e.g., Territory v. Gay*, 31 Haw. 376, 387-88 (1930), and; (2) that water rights however acquired are freely transferable to any land within or without the watershed on which they arose, so long as the water rights of others are not thereby deleteriously affected. *See, e.g., Wong Leong v. Irwin*, 10 Haw. 265, 270-72 (1896).

On appeal to this court by McBryde, the State, and Gay and Robinson, many issues were raised, including, among other things, the correctness of the trial court's adjudications of the quantum of appurtenant water rights of the parties, the amount of water, if any, to which McBryde was entitled by prescriptive use, and the proper disposition of storm and freshet surplus water. This court upheld the findings of the trial court with respect to the amount of appurtenant water belonging to the State, McBryde, and the Small Owners, *McBryde Sugar Co. v. Robinson*, *supra* at 187-89, 504 P.2d at 1339-40, and affirmed in part and reversed in part the findings of the trial court as to the amount of appurtenant water to which Gay and Robinson was entitled. *Id.* at 189-90, 504 P.2d at 1340. This court also reversed the finding below that McBryde had acquired title to over two million gallons of water per day by prescriptive use. *Id.* at 198, 504 P.2d at 1344-45.

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[6] Normal surplus water is all water in a stream or river "not required for the satisfaction of . . . prescriptive or . . . appurtenant rights," Territory v. Gay, 31 Haw. 376, 384 (1930), excluding only storm and freshet water as defined in note 7 *infra*.

[7] Storm and freshet surplus water is that amount of water above the normal flow of a stream or river which is intermittently caused by storm precipitation. *See* Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680 (1904); HUTCHINS 74-77.

At this point, however, this court departed radically in two major respects from the reasoning of the trial court and the positions taken by the various parties. First, it held that all surplus water in the State, including normal and storm and freshet surpluses,[8] is the property of the State and not the property of the *konohiki* of the *ahupuaa* or *ili kupono* on which the water originates. *Id.* at 180-87, 504 P.2d at 1335-39. This holding was grounded entirely on a specific portion of the Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, adopted by the Land Commission on August 20, 1846 and approved by resolution in the Legislative Council on October 26, 1846, RLH 1925, Vol. II, 2124, 2128 (originally enacted as L. 1847, at 81, 85) [hereinafter cited as Land Commission Principles], which announced that the Mahele left unimpaired the king's power "[t]o encourage and even to enforce the usufruct of lands for the common good."[9] This provision, it was held, reserved to the kind and, through subsequent governments, to the State, the control of all surplus surface waters in Hawaii for the common welfare of the Hawaiian people.

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[8] *See* notes 6 and 7 *supra*.

[9] The court stated:

> The principles specifically and most emphatically indicated that the Land Commission was only authorized to convey certain of the King's rights in land which had been bestowed upon individuals by him, to wit:
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> "[H]is private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands are the following:
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> * * * *
>
> "3rd. To encourage and even to enforce the usufruct of lands for the common good * * *."
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> * * * *
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> "These prerogatives, power and duties, his Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board and titles consequent upon them must be understood subject to these conditions." L. 1847, 85; RLH 1925, Vol. II, p. 2124, 2128.

54 Haw. at 185-86, 504 P.2d at 1338.

Second, this court held that section 7 of the Enactment of Further Principles, originally published as L. 1850, § 7, at 202, and presently compiled in HRS § 7-1,[10] codified the doctrine of riparianism as it existed in Massachusetts and England in the mid-nineteenth century, and that under that doctrine water rights acquired by virtue of ownership of lands along the bank *(ripa)* of a stream or river were appurtenant exclusively to those parcels of land and could not be transferred to remote parcels. 54 Haw. at 191-98, 504 P.2d at 1341-44.

Because the above two principles, if correct, would have precipitated a revolutionary change in the Hawaiian system of water rights as it has been understood heretofore, *see* HUTCHINS PASSIM, the court decided that additional enlightenment with respect to its further adherence to them would be helpful. Accordingly, the court granted the petitions for rehearing sought by McBryde, Gay and Robinson and the Small Owners, and centered the inquiry around the following issues:

1. The pertinent portion of HRS § 7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:

> "The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."

Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?

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[10] That section provides:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. *The people shall also have a right to drinking water, and running water,* and the right of way. *The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple;* provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

(Emphasis added).

2. The parties in this action introduced evidence, as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant?

II. THE OWNERSHIP OF SURFACE RUNNING WATERS IN HAWAII

A. *The Reasoning of* McBryde I

The only private rights to surface running waters in the Hanapepe Valley specifically acknowledged to the parties by *McBryde I* are those referred to as appurtenant by that case and prior cases, *i.e.*, rights to the amount of water used for taro cultivation on specific plots of ground at or immediately preceding the time of Land Commission Awards.[11] *McBryde Sugar Co. v. Robinson*, *supra* at 187-90, 504 P.2d at 1339-40; *see* HUTCHINS 102-02 and cases cited therein.[12] All other water in the valley (surplus water), *McBryde I* held, belongs to the State.

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[11] Under *McBryde I*, although in theory the acquisition of private rights to water by *prescription* is still possible in Hawaii, the holding that all surplus water in a stream or river belongs to the State renders the establishment of such rights as a practical matter highly problematical since, as the court held, "one may not claim title to or interest in state-owned property by adverse use." 54 Haw. at 198, 504 P.2d at 1345. Prescriptive rights to water would be possible only in the case of a watercourse in which the surplus water amounts in quantity to less than the water prescribed. Where any surplus exists, *McBryde I* requires that the appropriator "cease prescribing the State's portion." *Id.* at 198, 504 P.2d at 1345. Title to the prescribed water in excess of the surplus water, if any, *presumably* would continue to be tested under traditional principles relative to the establishment of title to private property by prescription or adverse use. *See* note 5 *supra*.

[12] *See also* H. A. WADSWORTH, *A Historical Summary of Irrigation in Hawaii*, 37 THE HAWAIIAN PLANTERS' RECORD 124, 140 (1933) [hereinafter cited as WADSWORTH].

The court's reasoning in this regard was based exclusively on language contained in the Land Commission Principles, RLH 1925, Vol. II, 2124, 2128 (originally enacted as L. 1847, at 81, 85).[13] The circumstances surrounding the adoption of the Land Commission Principles are detailed in *McBryde I*. 54 Haw. at 184-85, 504 P.2d at 1337-38. The only point needing reiteration here is that these measures were adopted by the Land Commission and approved by the Legislature for the purpose of providing the Land Commission with standards for the adjudication of private land titles following the Great Mahele of 1848, by which King Kamehameha III "proclaimed that he was sharing the lands in the Hawaiian Kingdom with his people." *McBryde Sugar Co. v. Robinson*, *supra* at 185, 504 P.2d at 1337-38.[14] It is true, as stated in *McBryde I*, that the Principles acknowledged the reservation by the sovereign of the "prerogative . . . to encourage and even to enforce the usufruct of lands for the common good." But to say that the king retained the power to "encourage" and "enforce" the "usufruct" of land is not to say that, *ipso facto*, he retained title to all surplus water in his kingdom. For while it is true that in ancient times "the King was the sole owner of the water as he was the rest of the land," *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904), the Land Commission was given the authority not only to confirm private allodial titles to land, but also to do so "in accordance with . . . native usages in regard to . . . *water privileges*." RLH 1925, Vol. II, 2123 (originally enacted as An Act to Organize the Executive Departments of the Hawaiian Islands, L. 1846, Pt. I., ch. VII, art. IV) (emphasis added).

That one of the most important "usufructs" of land is the right to water cannot be doubted. *See McBryde Sugar Co. v. Robinson*, *supra* at 186 & n.12, 504 P.2d at 1338 & n.12. However, to maintain, as the court did, that since water is a "usufruct" of land, therefore it was retained by the king after

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[13] The text of these principles relied upon in *McBryde I* is set out at note 9 *supra*.

[14] *See generally* 1 R. KUYKENDALL, THE HAWAIIAN KINGDOM ch. XV (1938) [hereinafter cited as KUYKENDALL].

the Mahele, is a fruitless line of analysis. For if all "usufructs" of land were retained by the king, then nothing but bare legal title was passed by the Mahele and subsequent Land Commission Awards — a proposition which is patently incorrect if not absurd. A more useful approach to the question of who owns the surplus water in Hawaii is to examine into Hawaiian usage and judicial precedent for enlightenment. The Land Commission Principles, at best, are ambiguous on the point and in and of themselves do not support the court's position.

B. *Ancient Hawaiian Usage*

The ancient Hawaiian system of water rights was elaborate and well-defined, built largely around the dependence of the Hawaiian people on taro cultivation. *See* E. S. HANDY & E. G. HANDY, NATIVE PLANTERS IN OLD HAWAII 57-67 (1972). Indeed, the Hawaiian word for law or regulation is *kanawai*, a compound of the word *wai*, meaning water[15] — a relationship which suggests that many early unwritten laws pertained to the regulation of water rights.[16] *See* A. PERRY, A BRIEF HISTORY OF HAWAIIAN WATER RIGHTS 3 (1912).

Under ancient usage, the king owned all land and water in the kingdom. *See Territory v. Bishop Trust Co.*, 41 Haw. 358, 361 (1956). However, a grant by the king to a *konohiki* of an *ahupuaa* or an *ili kupono* carried with it not only the control of the land and the right to its products, but also the absolute right to control the disposition of surplus water. *See* HUTCHINS 84-85. Although the *konohiki* was always subject to summary disseizin by the king, the bundle of rights and powers concomitant with the grant of such a parcel of land clearly included the legal right to surplus water and the power to use

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[15] M. PUKUI & S. ELBERT, HAWAIIAN-ENGLISH DICTIONARY 119 (3d ed. 1965) defines *kanawai* as: "Law, code, rule, statute; legal (perhaps so called because many early laws pertained to water [*wai*] rights)."

[16] For example, under ancient law, no dam could divert more than one-half of the water in a stream for irrigation. Moreover, the penalty for the malicious destruction of a lawful dam was death, the tamperer's body being used in repairing the damage to the dam by way of example. WADSWORTH 130. *See also* note 35 *infra*.

it however the *konohiki* saw fit. *See* A. PERRY, *supra* at 11. Because such rights and powers were historically associated with land tenure in ancient Hawaii, it is natural to assume that when King Kamehameha III engineered the Great Mahele in 1848, he intended to *mahele* not only his legal title to the land but also his legal title to surplus water originating on all land not retained by himself as Crown property. As stated by Professor Wadsworth:

> Patently [surplus] water belonged to the chief, at the pleasure of the King, and in all logic the legal ownership passed to the chief along with the ownership of land upon his completion of the legal requirements of the Mahele.

WADSWORTH 132. *See generally* 1 KUYKENDALL ch. XV.

C. *Hawaiian Judicial Precedent*

The foregoing general historical observations are supported by a long line of Hawaiian judicial precedent. I undertake to analyze this precedent here in order to point out more fully the errors of *McBryde I*.

Peck v. Bailey, 8 Haw. 658 (1867), was a controversy between landowners within an *ahupuaa* involving the right of one such landowner to make certain diversions of water from a river originating within the *ahupuaa* to dry *(kula)* land. Although the case specifically adjudicated only appurtenant water rights, the court observed, in dictum, that the conveyance by the king of land "bordering on [a] river will include the rights of water in said river, *which had not been before granted* [*i.e.*, surplus water]." *Id.* at 671 (emphasis added).

Davis v. Afong, 5 Haw. 216 (1884), involved a dispute over the right of a *konohiki* to appropriate running underground spring water which originated on his land. The court held that *konohiki* land awarded subsequent to the Mahele carried with it the right to the surplus spring water originating thereupon. However, the court's reasoning had more far-ranging implications. If private land grants pursuant to the Mahele included the right to running *spring* water (an important "usufruct" of the land), then it would seem that *a fortiori* the

grants included the right to running surface water.[17]

In *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675 (1904), the court for the first time was faced squarely with the question of the ownership of surplus running water. The case involved a single *ahupuaa* that had been split in ownership between the complainant, as owner of the land in the *ahupuaa* in which a river originated, and the respondent, as owner of a large tract of *kula* land within the *ahupuaa*. At the heart of the suit were diversions by the respondent of all the surplus water from the river for the purpose of irrigating its *kula* land. The court held specifically that the grant to the respondent of the dry part of the *ahupuaa* did not carry with it the right to *all* the surplus water. *Id.* at 683. Instead, the court held:

> Surplus water. This, in our opinion, is the property of the konohiki [of the entire *ahupuaa*], to do with as he pleases, and is not appurtenant to any particular portion of the ahupuaa. By ancient Hawaiian custom this was so . . . [N]o limitation, so far as we can learn, ever existed or was supposed to exist to his power to use the surplus water as he saw fit.

Id. at 680. The indication in *McBryde I* that the foregoing passage was dictum, 54 Haw. at 182, 504 P.2d at 1336, was erroneous, since the determination of who owned the surplus water was, as it is in this case, necessary to the proper resolution of the controversy between the parties to the suit. *Cf. State v. Tominaga*, 45 Haw. 604, 612-13, 372 P.2d 356, 361 (1962).

The next case to consider title to the surplus water of a stream was *Carter v. Territory*, 24 Haw. 47 (1917). In *Carter*, a stream originated on one *ahupuaa* (owned by the Territory) was flowed through that land to a second *ahupuaa* (owned by the plaintiff). The sole issue in the action was whether the Territory, *as* konohiki *of the upstream* ahupuaa, was entitled

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[17] The court indicated as much in dictum:

> By the rules of ancient Hawaiian agriculture the konohiki patches would be entitled to water. And it is a general principle, and not disputed, that a landowner is entitled to the use of the water originating upon his land, subject only to the rights which others may acquire by prescription.

5 Haw. at 221.

to all of the storm and freshet surplus water in the stream. The court acknowledged that "[w]here a stream flows through a single *ahupuaa* . . . the [normal] surplus waters of the stream belong to the *ahupuaa*." *Id.* at 70. However, it went on to hold that the ownership of *storm and freshet water* which passes through two *ahupuaas* must be divided between them on the basis of the common law doctrine of riparianism.[18] *See Territory v. Gay*, 31 Haw. 376, 404 (1930) (Parsons, J., concurring in part and dissenting in part). Whatever the wisdom of the *Carter* court in adopting the riparian doctrine with respect to this class of surplus water, a necessary element of its holding in this regard was that such water was subject to private ownership and was *not* the property of the government. *See Foster v. Waiahole Water Co.*, 25 Haw. 726, 734 (1921) (surplus water is the "class of water which originally the chief or *konohiki* could dispose of at will irrespective of the rights of the other owners and tenants"). The overruling of this aspect of *Carter* in *McBryde I* was ill-advised, especially in light of the reliance on that case earlier in the court's opinion for the proposition that the water law of this State is governed by riparian doctrine. *See* 54 Haw. at 182, 504 P.2d at 1336.

Finally, *Territory v. Gay; supra*, held unequivocally that the normal surplus water of a stream was the private property of the *konohiki* of the *ahupuaa* or *ili kupono* on which it originates. This was a suit by the Territory to enjoin diversions by Gay and Robinson (both parties here) of surplus water from the Koula stream. The Territory argued that as owner of the *ahupuaa* of Hanapepe it was entitled to all the surplus water originating in the valley, even though the source of that water was in the *ilis kupono* of Koula and Manuahi, owned by Gay and Robinson. The court, however, reasoned that an *ili kupono* was co-equal in dignity with an *ahupuaa*, and that at least as to normal surplus water which originated on an *ili kupono* the *konohiki* thereof had title paramount to that of the *konohiki* of a downstream

[18] *See* pt. III.D.2. *infra*.

ahupuaa.[19] *McBryde I* gave a grudging acceptance to *Gay* by holding that as between the State and Gay and Robinson the case was res judicata. 54 Haw. at 177-79, 504 P.2d at 1334-35. However, the court proceeded to sap that precedent of its force by holding that under established Hawaiian water law there is no such thing as "normal daily surplus water." *Id.* at 199, 504 P.2d at 1345. In doing so, the court ignored the well-defined and often reiterated meaning acquired by the term "surplus water" over the course of more than a century of Hawaiian law, *viz.*, all water in a stream not required to satisfy appurtenant or prescriptive rights. *See* HUTCHINS 69 & n.15 and cases cited therein; note 6 *supra*. It follows that the *Gay* case awarded to Gay and Robinson real and substantial water rights in accordance with this meaning. *See McBryde Sugar Co. v. Robinson*, *supra* at 206, 504 P.2d at 1348 (Marumoto, J., concurring and dissenting).

The foregoing judicial pronouncements, even standing alone, are highly persuasive authority for the proposition that title to the surplus waters of *maheled* land passed into the private hands of the *konohikis*. As stated in *Yoshizaki v. Hilo Hospital*, 50 Haw. 150, 153, 433 P.2d 220, 222-23 (1967), this court is not "as free in deciding cases in the area of real property as in the area of torts," even if it is assumed, for the sake of argument, that the above-mentioned line of precedent projects a consistently erroneous line of reasoning. *In re Austin*, 33 Haw. 832, 839 (1936) (the doctrine of stare decisis has a special force in the area of land law; even though prior decisions may be unsound, if they are "long established and conformed to . . . such decisions should not be

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[19] The *Gay* court was split three ways. Perry, C.J., felt that *all* the surplus water of a stream, normal and storm and freshet, belongs to the *konohiki*, and thus would have overruled Carter v. Territory, *supra*. Banks, J., would have held that all the surplus water of a stream belongs to owners of land along the *ripa* thereof according to the principles of common law riparianism, and therefore would have extended the *Carter* holding to include *both* storm and freshet surplus water and normal surplus water. Parsons, J., agreed with Mr. Chief Justice Perry that normal surplus water belongs to the *konohiki*, but concluded that on the record the question of title to storm and freshet surplus was not presented, and therefore expressed no opinion on the question of whether *Carter* should be overruled.

overturned").[20] The very substantial agricultural industry of this state exists in its present configuration only by virtue of great expenditures made for the development of irrigation systems. *See McBryde Sugar Co. v. Robinson*, *supra* at 201, 208, 504 P.2d at 1346, 1349 (Marumoto, J., concurring and dissenting). These systems are designed to deliver vast amounts of water which, under prior decisions of this court, was thought to be the subject of private ownership and development. *See, e.g.*, WADSWORTH150-58. *See generally* 3 KUYKENDALL 62-70; R. KUYKENDALL & A. DAY, HAWAII: A HISTORY 128, 153-54 (rev. ed. 1948).

I discuss the constitutional ramifications of the court's sudden about-face from these decisions in pt. IV of this opinion. But I need not rest the judgment that the court erred in *McBryde I* as a matter of state law solely on a re-evaluation of prior case law and ancient Hawaiian usage. There is other historical evidence which lends final force to that judgment.

D. *The 1917 Report of the Water Commission of the Territory of Hawaii to the Governor*

In 1915, the Legislature of the Territory of Hawaii, concerned about providing for the optimum utilization of the water resources within the territory under then existing laws, passed An Act to Provide for the Appointment of a Commission to Examine into the Water Resources and Water Laws of the Territory. L. 1915, Act 36. The first section of the statute provided as follows:

> The governor is hereby authorized to appoint a commission of three persons, one or more of whom shall be a member or members of the legal profession, which shall serve without pay, *and which shall collect and examine available data and information relative to the water resources, both underground and surface, and both privately and publicly owned or controlled, in the Territory of Hawaii;*

[20] *See* Langenegger v. State, 64 N.M. 218, 222, 326 P.2d 1098, 1101 (1958) ("The rule that these drainage waters are private has become a rule of property, and it is now too late to change it, even if we were inclined so to do").

Which shall also examine and make a study of existing laws pertaining to the diverting, developing, using, conserving, holding, and wasting of water;

Which shall, if deemed necessary, employ the services of legal and technical experts;

Which shall have the power to visit, examine and measure all existing water sources, channels, ditches, wells, tunnels or other structures used for transporting or utilizing water; and

Which shall make such recommendations and draft such legislation as may by it be deemed necessary to serve the best interests of the people of the Territory of Hawaii, and shall embody the same in a report to the governor on or before January 1, 1917.

(Emphasis added). As the italicized portions of the statute indicate, the mandate of the Commission was far-ranging, and included no less than an invitation to propose a complete revision of the water laws of the territory should such a change be found necessary.

Soon after the passage of the Act, the governor appointed Messrs. G. Larrison, A. Smith (then the first Deputy Attorney General of the Territory) and T. Sedgwick as commissioners to undertake the study. They were assisted in this regard by A. Chandler, a member of the State Water Commission of California and a foremost authority on water law. After nearly two years of preparation, the Commission issued its recommendations in the form of a *Report of the Water Commission of the Territory of Hawaii to His Excellency the Governor of Hawaii* (January 13, 1917) [hereinafter cited as *Water Commission Report*].

The Commission recommended the adoption of a detailed code relating to the development and husbandry of underground artesian water, because in large measure the use of such sources of water had begun relatively late in Hawaii's history, *see* 3 KUYKENDALL 66-70, and hence a tested and well-reasoned system of artesian water regulation had not had time to evolve. *See* HUTCHINS 178-79 and cases cited therein. The Legislature adopted virtually *verbatim* the specific legislation drafted by the Commission. RLH 1955 ch.

101 (originally enacted as L. 1917 ch. 156).

However, with respect to surface waters, the Commission reported as follows:

> *We have come to the conclusion that we do not care to recommend any legislation concerning surface waters.* As is stated by Mr. Chandler in his report to the Commission dated November 4, 1916 . . . *we already have a very good workable method for the determination of rights to surface waters; and the law relative thereto has been fairly definitely settled by a series of decisions.* There are, it is true, several questions as yet unsettled, but we believe them to be of such a nature that they can be better determined by the courts than by positive legislation which could only attempt to define and not change vested rights in the absence of provision for compensation therefor.
>
> *Accordingly, we make no recommendation for any legislation at the present time pertaining to the diverting, developing, using, conserving, holding or wasting of surface water.*

Water Commission Report 9 (emphasis added). These recommendations were evidently accepted, for no laws relative to surface waters were subsequently forthcoming. This acceptance by the Legislature of the Commission's recommendation that existing judicial precedent adequately and correctly reflected the status of Hawaiian water law is legislative recognition that surplus surface waters belong to the *konohiki* of the *ahupuaa* or *ili kupono* on which they originate. The Commission and the Legislature not only had before them dicta supporting this proposition in *Peck v. Bailey*, *supra* and *Davis v. Afong*, *supra*, but also an express holding to this effect in *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, *supra*.

E. *The Long-standing Position of the Territorial and State Governments of Hawaii with Respect to the Ownership of Surplus Water*

1. *Evidence of the State's Non-ownership*

For a period in excess of 60 years, the government of

Hawaii has executed the laws of the Territory and the State in a manner which both expressly and impliedly has acknowledged that title to surplus water rests in the owner of *ahupuaa* or *ili kupono* on which it originates. Although in a position to know the law relating to this subject and to enforce it in the best interests of the people of Hawaii, successive attorneys general and their offices as well as territorial and state taxing authorities have consciously adopted legal positions premised on the basic proposition of private ownership of surplus water.

In a *Statement Regarding the Law of Waters and Water Rights in Hawaii, as Existing with Relation to Fresh Waters*, 4 HONOLULU WATER COMMISSION RECORDS 169 (1908), the then attorney general of the Territory of Hawaii, C. R. Hemenway, specifically acknowledged the right of the *konohiki* to surplus water arising on his land. In doing so, he noted that King Kamehameha III *mahele'd* not only land into private ownership, but also all the water flowing on the land. *Id.* at 169-70. Similarly, in 1919 the attorney general gave an opinion to the Lahainaluna School on Maui with respect to its water rights which rested on the implied proposition that the Pioneer Mill Company, not the Territory, owned the surplus waters flowing in the watercourses of the valley of Kauaha. 1919 OP. ATT'Y GEN. 386.

Other evidence of the government's position in this regard abounds. In *Carter v. Territory*, *supra*, the Territory took the unequivocal stance that surplus water belongs to the *konohiki* of the *ahupuaa* on which it originates. Opening Brief for Territory at 272-73. The legal arguments of the Territory in *Territory v. Gay*, *supra*, echoed its position in *Carter*. Opening Brief for Territory at 16. Indeed, in this very case the State made no claims to the surplus water of the Hanapepe watershed, conceding the private ownership thereof to Gay and Robinson. *Cf.* Opening Brief for State at 7-9. *McBryde Sugar Co. v. Robinson*, *supra*.

Moreover, since at least 1913, the Territory and thereafter the State have taxed surplus water severed in ownership from the land upon which it originated as the property of its private owner. *See In re Taxes, Waiahole Water Co.*, 21 Haw. 679

(1913). In *Waiahole Water*, this court upheld the taxation to the taxpayer of surplus water which had been conveyed to him by the *konohiki* of an *ahupuaa*. In holding that a tax assessment on the water separate from its land of origin was proper, the court noted that "'[t]he intent of grantors, grantee *and assessor* to separate the water rights from the remaining interests in the lands is beyond doubt.'" *Id.* at 682 (emphasis added). *See also* Brief for appellee at 8-9, *id.* Similarly, it was established without contest in *Territory v. Gay*, *supra*, that "the Territory has been assessing and collecting taxes upon the land of Makaweli at its value as the same has been enhanced by the use of Koula water upon it. [*i.e.*,] the value of the [surplus] water has regularly been assessed for taxation as the private property of the respondents." Opening Brief for Gay and Robinson at 43, *id.*

This practice of taxing surplus water as private property, in addition to the knowingly and consistently followed position of successive attorneys general and their staffs, constitute compelling historical evidence that the State and its predecessor governments have at all times prior to this court's opinion in *McBryde I* regarded surplus water as private and not sovereign property. *In re Title of Kioloku*, 25 Haw. 357 (1920), is highly persuasive in this regard. In *Kioloku* the Territory claimed title to an *ahupuaa* that was ostensibly privately-owned on the ground that the land was not included in the Great Mahele of 1848. Although there was no record of an award of the land in question, the court nonetheless refused to award it to the Territory, reasoning that the government had made no claim of ownership of the property for nearly sixty years and that:

> during the whole period the property was assessed as the property of Kalakaua and his successors in interest and taxes were collected by the government down to the date of the institution of this proceeding. As said in *Jover v. Insular Government*, 221 U.S. 623 [(1911)], we would not be justified in assuming that the State would collect taxes on its own property.

Id. at 364.[21]

The foregoing facts indicate persuasively that the reasoning of *McBryde I* turned on assumptions which are wholly unjustified by and contrary to the consistent and long-standing posture of the Hawaiian government with respect to surplus water. Such a posture knowingly adopted for more than half a century, is strong evidence of the government's non-ownership, and at the very least should have been dealt with by the majority.

2. Equitable Estoppel

In response to the argument of the Territory in *Territory v. Gay*, *supra*, that surplus water in the Hanapepe Valley was government owned, Gay and Robinson adduced considerable evidence that the government should be estopped from asserting whatever title it had to such water. *See* Gay and Robinson, *id.*, at 33-43. This evidence included the government's silence in the face of Gay and Robinson's overt and well-known expenditures of large sums of money for the development of surplus water, statements by then Governor Frear acquiescing in Gay and Robinson's claim of private title, and taxation by the Territory of surplus water as privately owned by Gay and Robinson.

It was the position of Gay and Robinson that in the event it should lose on the issue of whether the *konohikis* of *ilis kupono* and *ahupuaas* were equal in status and rights, the evidence of the government's affirmations of and knowing

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[21] In Jover v. Insular Government, 221 U.S. 623 (1911), the issue was whether an ancient land grant by the Spanish governor of the Philippine Islands to plaintiff's predecessor in interest was valid or in excess of the governor's authority. The Court held that in light of historical evidence the governor did have authority to execute the grant in question, but proceeded to consider the following other circumstances as supportive of this conclusion:

> The Spanish authorities at Manila, although familiar with what was done and claimed under the grant, and although in a position to know and enforce the law applicable to it, *did not call it in question at any time during the thirty-nine years of Spanish dominion after it was made, but, on the contrary, treated it as valid by imposing taxes upon the land as private property*. This is persuasive proof that in making the grant the Governor General did not exceed his authority.

Id. at 633 (emphasis added).

acquiescence in Gay and Robinson's title to surplus water in the Hanapepe Valley, coupled with the latter's extensive reliance thereupon, sufficed equitably to estop the Territory from claiming ownership of the water. *Cf. Kauhi v. Liaikulani*, 3 Haw. 356 (1872). Of course, this position was never tested since *Territory v. Gay* held that Gay and Robinson owned the surplus water in any event. Nor did Gay and Robinson urge the point at trial in this case, since the basic ownership of surplus water in the valley was not contested by the State and since *Territory v. Gay* had *seemingly* settled the issue.

Whatever doubts that previously existed in this State as to whether the government can be equitably estopped, *see Godbold v. Manibog*, 36 Haw. 206, *reh. denied*, 36 Haw. 230 (1942), in my opinion were dispelled by *Yamada v. Natural Disaster Claims Commission*, 54 Haw. 621, 513 P.2d 1001 (1973). In an analysis that alternatively supported the result in the case, *Yamada* announced "that the doctrine of equitable estoppel is fully applicable against the government if it is necessary to invoke it to prevent manifest injustice." *Id.* at 629, 513 P.2d at 1006. While this aspect of *Yamada* was subsequently disavowed by the court as not essential to the result in the case, *Yamada v. Natural Disaster Claims Commission*, 55 Haw. , P.2d (1973), the soundness of its reasoning has not been questioned. That it correctly projects the law of this jurisdiction is apparent from the recent decision of this court, *Waianae Model Neighborhood Association, Inc. v. City & County*, 55 Haw. 40, 44, 514 P.2d 861, 864 (1973), wherein we agreed with the following proposition as "eminently fair and equitable":

> [A]n act of an administrative official which is without any semblance of compliance with or authorization in an ordinance, is beyond his competence and is utterly void; but an act of such official, done in good faith and within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance, is no more than an irregularity, and *the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith.*

(Emphasis added).

Yamada involved an attempt by the Natural Disaster Claims Commission to revalue downwards certain tax credits it had awarded the plaintiff as a result of property losses he had suffered in a tsunami. Relying on the originally adjudicated amount of these credits, the plaintiff had made substantial expenditures in developing his property on the island of Hawaii. These expenditures in reasonable reliance on the Commission's award, the court held, meant that the government was estopped from now reducing that award. The court stated:

> A denial of such credits after more than two years means, in effect, that his investment in compliance with the statute is wholly dependent upon the State's continuing decision not to take away that which it gives. We think this is a patently unfair burden to impose upon the claimant.

54 Haw. at 630, 513 P.2d at 1007.

The relevance of *Yamada* to this controversy is obvious. That the government had led Gay and Robinson into the expenditure of large sums of money in the development of surplus water, Gay and Robinson offered to prove in *Territory v. Gay*, *supra*. Moreover, the position of the Territory in this regard originated at the highest levels of government, and was not merely the unauthorized stance of low-eschelon employees. Compare *Godbold v. Manibog*, *supra* at 214-15. In the circumstances, even assuming the correctness of *McBryde I* as a general matter, Gay and Robinson should have been afforded an opportunity to prove that the State should be estopped from asserting ownership of the surplus water in the Hanapepe Valley. If anything, evidence showing the government's long-standing position and Gay and Robinson's reliance presents a factual situation in which the equities may be greater in favor of estoppel than in *Yamada*. Surely the logic of *Yamada* is that the government may not lawfully reverse previously firm policies with respect to property when, in reasonable reliance thereupon, private parties have expended significant sums of money. *See City of Long Beach v. Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr.

23 (1970). I find the majority's failure to consider this argument in the present case legally inexcusable.

F. *Normal Surplus Water is the Exclusive Property of the* Konohiki *of the* Ahupuaa *or* Ili Kupono *on which it Originates*

In view of ancient Hawaiian usage, Hawaiian judicial precedent, and the other historical evidence explored in this opinion, I would reverse *McBryde I* with respect to the ownership of normal surplus water and adhere to the prior position of this court consistently expressed in *Hawaiian Commercial Sugar Co. v. Wailuku Sugar Co., supra, Carter v. Territory, supra,* and *Territory v. Gay, supra.* To reiterate, these cases held that when Kamehameha III *maheled* his lands in 1848, it was his clear intent to pass both the title to land and the title to water thereupon. Consistent with ancient Hawaiian usage, this meant that upon the *konohikis* devolved title to all surface water originating on their lands excepting that required to satisfy the appurtenant rights and prescriptive rights of others. Stated flatly, normal surplus water should be the private property of the *konohiki* from whose land it springs and not the property of the State.

III. THE TRANSFERABILITY OF PRIVATELY OWNED WATER IN HAWAII

A. *The Reasoning of* McBryde I

The second major branch of *McBryde I* was that private water rights, however acquired,[22] are subject to the strictures of the common law doctrine of riparianism. Under that doctrine, the ownership of a parcel of land abutting the *ripa* of a stream carries with it "the right to flow of [the] stream in

[22] In view of the holding of *McBryde I* such private rights would include water appurtenant to a specific parcel of land and water acquired by prescription, but not normal and storm and freshet surplus waters.

the form and size given it by nature." *McBryde Sugar Co. v. Robinson*, *supra* at 192-93, 504 P.2d at 1342. The court held that a corollary of this right at common law is the privilege of riparian landowners to prohibit the diversion of water by one such landowner unless he returns it to its original watercourse substantially undiminished in quantity. *See* HUTCHINS 95; L. TECLAFF, *What You Have Always Wanted to Know about Riparian Rights, But were Afraid to Ask*, 12 NATURAL RESOURCES J. 30, 39-53 (1972) [hereinafter cited as TECLAFF].

The court's reasoning was bottomed wholly on section 7 of the Enactment of Further Principles, originally published as L. 1850, § 7, at 202, and presently compiled in HRS § 7-1[23] which, in its English version, guarantees to the "people . . . a right to drinking water [and] running water," and also declares that "[t]he springs of water [and] running water shall be free to all, on all lands granted in fee simple." Based on this language, and the historical generalization that "the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts," 54 Haw. at 193, 504 P.2d at 1342, the court concluded that privately owned water may only be used in connection with the land to which it is appurtenant and may not be transported to *kula* land elsewhere. This conclusion followed, it was thought, from the cases and authorities on common law riparianism which were examined with considerable care in *McBryde I*, *Id.* at 193-97, 504 P.2d at 1342-44.

While *McBryde I* may have been adequate in its exegesis of the law of riparianism as a general matter, it is my opinion that the court erred in holding that the Enactment of Further Principles codified that law as the system by which to measure water rights in Hawaii. While the array of authorities affirming my position in this respect are persuasive as a

[23] This section is set out in full at note 10 *supra*.

matter of water *policy*,[24] I base my conclusions primarily on statutory construction and an analysis of Hawaiian usage and judicial precedent during the Hawaiian monarchy and thereafter.

Under HRS § 1-1,[25] it would be the responsibility of the court to declare riparianism to be the law of this State *unless* it was able to discern "Hawaiian judicial precedent . . . or . . . Hawaiian usage" indicating that a different legal doctrine had been followed in Hawaii prior to January 1, 1893.[26] As will be demonstrated, however, Hawaiian history and case law establish that privately owned water is severable from the land to which it was originally appurtenant and is freely transportable to other lands both within and without the same watershed — a doctrine fundamentally at odds with the riparian theory espoused by *McBryde I*.

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[24] As stated by Mr. Hutchins:

> [T]he riparian doctrine . . . is not well suited to areas in Hawaii . . . in which the demand for irrigation water substantially exceeds the supply. . . .
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> The . . . doctrine was developed under essentially humid conditions, where the supplies of water generally were much greater than the requirements for water, and where irrigation seldom was practiced, if at all.

HUTCHINS at 95; *see* C. HEMENWAY, *Statement Regarding the Law of Waters and Water Rights in Hawaii, as Existing with Relation to Fresh Waters*, 4 HONOLULU WATER COMMISSION RECORDS 169, 171 (1908); WADSWORTH *passim; cf.* City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 938-43 (1929) (declining to adopt as the law of Hawaii the English common law rule of absolute ownership of percolating waters). *See generally* TECLAFF 39-53.

[25] That section provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

[26] The Hawaiian judicial precedent and usage referred to in HRS § 1-1 are those that arose prior to January 1, 1893, the effective date of that section. State v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 204 (1970); De Freitas v. Coke, 46 Haw. 425, 429-30, 380 P.2d 762, 765-66 (1963). The basic purpose of the provision was summarized in *De Freitas* as follows:

> It is apparent that when the legislature adopted [HRS § 1-1] it was cognizant of the fact that before such enactment, the courts of Hawaii had not adopted the common law of England *in toto* and consequently made certain qualifications. Accordingly, it was deemed necessary to provide for exceptions.

Id. at 430, 380 P.2d at 766.

B. *Section 7 of the Enactment of Further Principles*

Subsequent to the Great Mahele, all lands in Hawaii were divided into three main categories: Crown Lands (retained by the King for his own private estate), *Konohiki* Lands (*maheled* into the private ownership of the chiefs and *konohikis*), and Government Lands (established as the property of the King *as sovereign* of Hawaii). *See* 1 KUYKENDALL 288-89. All of these lands, however, were made "subject to the rights of tenants" (*hoaainas*) by virtue of An Act Relating to the Lands of His Majesty the King and of the Government, RLH 1925, Vol. II, 2152 (originally enacted as L. 1848, at 22).

Events made it clear, however, that the phrase "rights of tenants" was not self-explanatory, and that legislation was needed to define *hoaaina* rights with greater particularity. Accordingly, the Privy Council undertook to delineate the specific meaning that the Great Mahele had for the *hoaainas* living on the three principal categories of *maheled* land. *See generally* J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, at 29-31 (1958). As a result of their deliberations, on December 21, 1849 the Privy Council adopted four resolutions which were enacted by the Legislature as the first four sections of the Enactment of Further Principles on August 6, 1850. These four sections, together with sections 5 and 6 passed by the Legislature on August 15, 1850, afforded *hoaainas* the private ownership of those parcels of land which they had traditionally dwelled upon and cultivated, and also established procedures by which *hoaainas* could receive allodial title to their *kuleanas* by way of grants from the Land Commission.

It was not until nearly one year later, however, that the Legislature added section 7 to these provisions. The legislative history of this section shows that it was intended to be the sole and exclusive measure of the rights of the *hoaainas* as against the *konohikis* of the land within which the *kuleanas* were situated. *See Oni v. Meek*, 2 Haw. 87, 94-96 (1858) (Robertson, J.).[27] *See also Carter v. Territory*, 24 Haw. 47, 67

[27] In *Oni*, a *hoaaina* claimed the right of pasturage against his *konohiki* based upon, *inter alia*, ancient tenant usage in the area. The court held, however, that

(1917). Subsequent to the adoption by the Privy Council of the first six sections of the Enactment of Further Principles, but prior to their passage by the Legislature, the King had expressed concern that "a little bit of land, even with allodial title, if they [the *hoaainas*] were cut off from all other privileges, would be of very little value." *Privy Council Minutes* (July 13, 1850).

This concern matured into the enumeration of specific *hoaaina* rights contained in section 7, adopted by the Privy Council on August 27, 1850. The measure was the product of deliberations among "the *native* members of the Privy Council presided over by the King," *Privy Council Minutes* (August 17, 1850) (emphasis added), an historical circumstance which severely undercuts the assumption in *McBryde I* that section 7 was the product of *haole* missionaries with backgrounds in English common law. Section 7 was finally enacted by the Legislature in June of 1851, and signed into law by the King on July 11, 1851. L. 1851, at 98-99. It was passed and printed in both the Hawaiian and English languages.

As indicated previously, the English version of the statute provided that "[t]he people shall also have a right to *drinking water*, and *running water*, and the right of way, [and t]he . . . *running water*, and roads shall be free to all, on all lands granted in fee simple." (Emphasis added). The word "people" in this section was properly interpreted by Mr. Justice Robertson in *Oni v. Meek*, *supra* at 96, to mean the *hoaainas* within the boundaries of the *konohiki*'s land. *McBryde I* held that the right of these *hoaainas* to "drinking water" and "running water" in the English version of the statute meant the right to the natural flow of a stream in accordance with riparian doctrine — a right which passed to successors in interest to their *kuleana* lands.

However, the Hawaiian version of the statute does not

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section 7 of the Enactment of Further Principles was a declaration of "*all* the specific rights of the hoaaina, (excepting fishing rights) which shoud be held to prevail against the fee simple title of the konohiki," 2 Haw. at 95, and that the failure of that section to provide specifically for the right of pasturage meant that no such right existed.

bear out the court's interpretation. The original Hawaiian text is as follows:

> I ka alodio ana o kekahi Konohiki i kona aina, a mau aina paha, aole no e nele na kanaka o kona aina ponoi a mau aina paha i ke kii ana i wahie, a i laau hale, a i alo, a i kaula a i pili, a i lai nona iho, aole nae i mea kuai i mea e waiwai ai oia, *e* loaa no hoi ia lakou ka pono o ka wai inu, a me ka *wai hookahe*, a me ke ala hele. A o na punawai a me na *wai e kahe ana*, a me na ala hele e noa no ia i na kanaka a pau mai o a o, ma na aina Alodio. Aole nae pili keia i na punawai, a me na hawai i hanaia e pono ai lakou iho.

(Emphasis added).

I have independently investigated the meaning of the Hawaiian, with particular focus on the phrases "*wai hookahe*" and "*wai e kahe ana*," which were translated in the English to mean "running water."[28] While it is true that "[w]henever there is found to exist any *radical or irreconcilable* difference between the English and Hawaiian version of any of the laws of the State, the English version shall be held binding," HRS § 1-13 (emphasis added),[29] the difference

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[28] This court has stated on numerous occasions that judges in Hawaii are "at liberty to resort, if necessary or convenient, to such trustworthy sources of information as may be deemed expedient" in resolving questions of the interpretation of an instrument or statute written in Hawaiian. Hapai v. Brown, 21 Haw. 499, 503 (1913). Such sources may include both dictionaries *and* experts (both of which were used here). *Id.* at 502-03; *see* Territory v. Bishop Trust Co., 41 Haw. 358, 367 (1956); Iv. Judd, 13 Haw. 319, 325 (1901).

[29] HRS § 1-13 is an expanded version of section 1193 of The Civil Code of the Hawaiian Islands ch. 11, at 367 (1859), which provided:

> SECTION 1193. If at any time a radical and irreconcilable difference, shall be found to exist between the English and Hawaiian versions of any part of this Code, the English version shall be held binding.

The reason for the limitation of this section to "radical and irreconcilable" differences can be discerned from the Preface to the Civil Code of 1859:

> In accordance with a Joint Resolution of the Legislature, the undersigned were appointed by the Minister of the Interior to compare the Hawaiian and English versions of the New Code, assimilating the same as far as practicable, and to superintend the publication of the same. *The work of comparing and assimilating the two versions, has been one of great labor and care; and while we cannot hope to have effected a perfect agreement between the Hawaiian and English texts, we feel confident that, in this respect, the Civil Code will be found more satisfactory than any of the laws published heretofore.*
>
> R. ARMSTRONG,
> G. M. ROBERTSON,
> Committee of Publication.

between the two versions in this case is not "radical or irreconcilable," and hence the Hawaiian can be used as an aid in the interpretation of the English.[30] This analysis is particularly appropriate with respect to section 7, in view of the fact noted above that the *native* members of the Privy Council, presided over by the King, initially drafted that provision and hence would logically be expected to have expressed themselves first in their native tongue.

I have consulted three dictionaries of the Hawaiian language[31] and Mrs. Zelie D. Sherwood, an expert translator of Hawaiian,[32] and all four sources independently confirm that, properly translated, the phrase "*wai hookahe*" means "water made to flow or to irrigate," and the phrase "*wai e kahe ana*" means "water already flowing."[33] Mrs. Sherwood

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(Emphasis added). The confessed inability of the translators to achieve a perfect coincidence between the two languages underscores the need for comparative analysis of a bilingual statute where a conflict therein appears to be less than "radical and irreconcilable." This was just as true after the Civil Code as before it, when the Hawaiian version of a statute was held judicially to control in cases of radical or irreconcilable conflict. *Compare* Metcalf v. Kahai, 1 Haw. *225 (1856) (conflict is irreconcilable and hence the Hawaiian version controls when the English text holds owners of estray animals liable for four times the actual damage done and the Hawaiian text holds such owners liable only for actual damages) *with* Hardy v. Ruggles, 1 Haw. *225, 259 (1856) ("where there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country . . . [but *the English and Hawaiian may often be used to help and explain each other where the meaning is obscure, or the contradiction slight*") (emphasis added).

[30] *See* cases cited in note 29 *supra*. As stated in In re Ross, 8 Haw. 178, 180 (1892) (emphasis added):

> [T]he two versions [English and Hawaiian] constitute but one act. There is no dual legislation. As a rule one version is the translation of the other. *The effort is always made to have them exactly coincide*, and the legal presumption is that they do.

[31] L. ANDREWS & H. PARKER, A DICTIONARY OF THE HAWAIIAN LANGUAGE (1922) (prepared under the direction of the Board of Commissioners of Public Archives of the Territory of Hawaii); M. JUDD, M. PUKUI & J. STOKES, INTRODUCTION TO THE HAWAIIAN LANGUAGE (1945); M. PUKUI & S. ELBERT, HAWAIIAN-ENGLISH DICTIONARY (3d ed. 1965).

[32] Mrs. Sherwood has testified as an expert frequently in civil litigation involving the translation of instruments written in Hawaiian, has translated Hawaiian documents for abstracting companies for more than 30 years, and is the author of ZELIE D. (FERNANDEZ) SHERWOOD, BEGINNING HAWAIIAN vols. I & II (1955).

[33] A reading of the English version of the proviso to section 7 supports this interpretation. The proviso announces that "water courses, which individuals have

has provided her translation of the whole text of section 7, and it would be instructive to quote the translation in full. It reads:

> When a konohiki acquires Allodial Title to his land or lands, the native tenants on his own land or lands shall not be deprived of gathering fire wood, and wood for homes, twine, rope, pili and ti leaf for his own use, not, however for personal gain, they shall also have the right to drinking water, *to bring about the flow age of water* and a pathway. The wells and water *already flowing* and the pathways shall be free to all native tenants from one end of the Allodial lands to the other. This, however, does not include wells and aqueducts made for their own personal gain.

(Emphasis added).

In my opinion, the foregoing translation accurately reflects the original meaning of section 7, which was merely that *kuleana* plots were guaranteed the right to appurtenant water for domestic and irrigation purposes, and in that context, the English translation reserving to *hoaainas* the right to "running water" is inherently ambiguous. "Running water" can mean many things, including water used for irrigation and domestic purposes, and therefore the more precise Hawaiian terms "*wai hookahe*" and "*wai e kahe ana*" (both denoting such limited uses of water) should be read by this court to qualify and limit the English. Compare *Metcalf v. Kahai*, 1 Haw. *225 (1856). This is an instance in which the English and Hawaiian texts are not in "radical or irreconcilable" conflict within the meaning of HRS § 1-13, but rather is an instance in which "the meaning is obscure, or the contradiction slight," and hence in which the two languages "may . . . be used to help and explain each other." *Hardy v. Ruggles*, 1 Haw. *255, 259 (1856) *see* notes 29 & 30 *supra*.

The foregoing analysis manifests the error of *McBryde I*.

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made for their own use" shall *not* be considered "running water" which is "free to all" within the meaning of the first part of the sentence of which the proviso is a part. The clear implication is that *ancient* water courses *kauwais* are to be considered "running water" and that the intent declaring these *auwais* as "free to all" was merely to allow *hoaainas* to satisfy their domestic and agricultural water needs. *Cf.* Carter v. Territory, 24 Haw. 47, 58-59, 67 (1917).

Section 7 of the Enactment of Further Principles guaranteed the right of *hoaainas* to water *for irrigation* and other domestic purposes. The obviously limited scope of this provision belies the court's interpretation of it as a wholesale codification of the common law doctrine of riparianism. Indeed, the right to use water for irrigation is wholly antithetical to riparianism as it existed in mid-nineteenth century England and Massachusetts. *See* HUTCHINS at 95; TECLAFF 44-45.

It follows that the reliance on this statute in *McBryde I* was misplaced. Analysis must therefore turn to whether Hawaiian judicial precedent or usage prior to January 1, 1893 established a system of water regulation different from the riparian doctrine that would otherwise be the law of this State by virtue of HRS § 1-1.[34]

C. Hawaiian Usage Prior to January 1, 1893

1. Ancient Hawaiian Usage

As indicated previously in this opinion, *see* pt. II.B. *supra*, central to Hawaiian culture prior to the advent of western influence was a sophisticated system of water regulation. Early Caucasian explorers, including Cook in 1778, Vancouver in 1798, and Campbell in 1809 commented with amazement and admiration on the complicated and technically advanced network of canals utilized by the Hawaiians in irrigating their crops. *See* WADSWORTH 125. Modern historian of Hawaiian civilization confirm the existence of these irrigation systems. *See, e.g.*, E. S. HANDY & E. G. HANDY, NATIVE PLANTERS IN OLD HAWAII 62-63 (1972); R. KUYKENDALL & A. DAY, HAWAII: A HISTORY 9, 91 (1948); A. PERRY, A BRIEF HISTORY OF HAWAIIAN WATER RIGHTS 3-7 (1912); WADSWORTH 125-36.

It has been noted already that under the ancient system of land tenure, the *konohiki* of an *ahupuaa* or *ili kupono* was given control over the surplus water originating on the land, albeit subject to the king's ultimate power of disseizin. The *konohiki* had plenary authority to demand the production of

[34] *See* notes 25 & 26 *supra*.

labor for the construction and maintenance of *auwais*, and also to marshal the water resources of the *ahupuaa* or *ili kupono* according to his perception of the relative agricultural and domestic needs of the *hoaainas* living thereupon. WADSWORTH 129-31. Traditionally, it was always within the power of the *konohiki* to divert water from lands on the *ripa* of a stream to other lands which were not appurtenant to the stream and which, indeed, had always theretofore been *kula*. *See Territory v. Gay*, 31 Haw. 376, 399-400 (1930); HUTCHINS 84-85.

While it is true that these diversions from wet taro lands to *kula* lands for the most part occurred within the confines of a single watershed, this was probably only due to the absence of the technology required for the transportation of water across mountain ridges.[35] *See Wong Leong v. Irwin*, 10 Haw. 265, 271-72 (1896). As stated in *Irwin*, however, "[t]here is no difference in principle between a transfer [of water] from one place to another in the same ahupuaa and a transfer from one ahupuaa to another [outside the watershed of the first ahupuaa]." *Id.* at 272. By hypothesis, both kinds of transfers assume water to be both the private property of the transferor and capable of permanent diversion from its original watercourse — characteristics which are inherently inimicable to the theory of riparianism which was expounded in *McBryde I*.

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[35] The Hawaiians in fact made inter-watershed transfers of water where technologically possible and economically necessary. There is, for example, an ancient aqueduct on Kauai, called the Menehune Ditch, which "is built around the base of a high cliff which hems in the Waimea River just before it reaches its delta area on the southwest coast of the island, and diverts irrigation water from the river to the series of *loi* [irrigated taro terraces] to seaward of the cliff." E. S. HANDY & E. G. HANDY, NATIVE PLANTERS IN OLD HAWAII 62 (1972). Furthermore, there is some evidence that with the use of gunpowder supplied by Caucasians in the early nineteenth century the Hawaiians constructed aqueducts for the transportation of water from one watershed to another. There exists, for example, an irrigation tunnel between watersheds near Niulii on the Island of Hawaii which had to be driven through 200 feet of lava rock. Its date of construction is put at between 1823-49 by one commentator, J. WILLIAMS, *A Little Known Engineering Work in Hawaii*, 1949 THOMAS'S ANNUAL 121-26, and at an even earlier date by another commentator, WADSWORTH 127.

See McBryde Sugar Co. v. Robinson, *supra* at 193-97, 504 P.2d at 1342-44.[36]

2. Hawaiian Usage in the Latter Half of the Nineteenth Century

With the advent of large-scale sugar cane cultivation in the last half of the nineteenth century, irrigation and water rights acquired a new dimension of importance in Hawaii.[37] The estimated requirement of a ton of water to produce one pound of refined sugar, 3 KUYKENDALL 62, made the securing of ample supplies of water essential for sugar producers. The first irrigation *auwai* built expressly for sugar cane was in 1856 on Kauai, and another was dug ten years later on Maui. *See* R. KUYKENDALL & A. DAY, HAWAII: A HISTORY 119-20 (1948). While early producers made use of ancient *auwais*, the phenomenal growth in the number of acres of land under sugar cane cultivation during the period of 1874-98,[38] especially when much of that land was in relatively arid locales theretofore uncultivated, resulted in the construction of costly and elaborate new irrigation systems. The first such system of any size was the Hamakua ditch on the Island of Maui, built in 1878 for the purpose of irrigation sugar cane on the arid lands of central Maui with water from the northern side of the island. 3 KUYKENDALL 62-66; WADSWORTH 144. A great many other aqueducts were built thereafter, at consid-

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[36] *McBryde I* also indicates that the riparian rights of the *konaina* "may be in connection with his right of laundering, canoeing, swimming, bathing, etc." 54 Haw. at 193, 504 P.2d at 1342. In this connection it should be noted that under ancient Hawaiian unwritten law it was *kapu* for an individual to swim or bathe in a stream at any point above its mouth, *see* J. Wise, *The History of Land Ownership in Hawaii* 86, in ANCIENT HAWAIIAN CIVILIZATION: A SERIES OF LECTURES DELIVERED AT THE KAMEHAMEHA SCHOOLS 81 (rev. ed. 1973) — an "Hawaiian usage" within the meaning of HRS § 1-1 which, if true, would lessen the enjoyment, if nothing else, of the riparian rights purportedly announced in *McBryde I*.

[37] It is interesting to note that the development of irrigation on a large scale in the continental United States is generally said to have begun with the Mormon migration to Utah in 1847. The growth of sugar cane irrigation in Hawaii was "essentially concurrent" with this development. WADSWORTH 142.

[38] Dr. Kuykendall notes that during the period of 1874-98, the number of acres under sugar cane cultivation increased from 12,225 to 125,000 — a ten-fold expansion. 3 KUYKENDALL 62.

erable cost and for the purpose of irrigating *kula* land both inside and outside the watersheds from which the water was drawn. *See generally id.* at 150-58. Indeed, by 1890-91, an irrigation system for the transportation of water from the Hanapepe Valley to Makaweli on the Island of Kauai was completed and in operation. *See Territory v. Gay*, 52 F.2d 356 (9th Cir. 1931); 3 KUYKENDALL 66.

It seems clear that the foregoing history of ancient and nineteenth century Hawaiian water practices, sanctioned by contemporaneous judicial precedent, *see* pt. III.D. 1. *infra*, establishes an "Hawaiian usage" fundamentally at odds with the common law doctrine of riparianism. This being the case, HRS § 1-1 does not compel the court to read that doctrine *in toto* into our legal system dealing with regulation of water rights.

D. *Hawaiian Judicial Precedent on the Subject of Water Transferability*

1. *Peck v. Bailey*, 8 Haw. 658 (1867)

The *Peck* decision was the product of Hawaii Supreme Court Chief Justice Allen sitting as a single justice in an equity proceeding in Superior Court. As indicated previously in this opinion, the case involved a controversy between landowners within a single *ahupuaa* with respect to one landowner's right to divert water which was appurtenant to a particular parcel of land from that land to another, *kula* parcel. Although the opinion discussed common law riparianism, the Chief Justice impliedly rejected that doctrine when he held as follows:

> The Court is of opinion, however, that the defendant had the right to use the water of his kalo [taro] land on other lands, if in the transfer or passage of water over his own land no injury was done to others. He is limited to the same quantity of water to which he was entitled on his kalo land by immemorial usage.

Id. at 666. The indication in *McBryde I* that this passage was dictum, 54 Haw. at 181, 504 P.2d at 1336, was unjustified, since essential to the resolution of the controversy in *Peck* was a decision on the question of water transferability. *Cf.*

State v. Tominaga, 45 Haw. 604, 612-13, 372 P.2d 356, 361 (1962).

Peck was the only decision prior to January 1, 1893 which squarely dealt with the question of water transferability. *Cf. Kahookiekie v. Keanini*, 8 Haw. 310 (1891). Notwithstanding its status as a single justice opinion, *Peck* stands as "judicial precedent" within the meaning of HRS § 1-1, establishing the proposition that privately owned water is freely transferable to *kula* land and therefore that riparianism is not the law of this State. All subsequent opinions have so interpreted the case, and in view of the Hawaiian usage comtemporary with *Peck* and in ancient times, the court should give effect to its holding.

2. Cases decided after January 1, 1893

A brief review of the cases decided by this court on the subject of water transferability since *Peck* will highlight the incorrectness of *McBryde I*.

Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895) involved the question of the transferability of water from a river to *kula* land within the same watershed. The court held:

> We find no objection either in law or reason to allowing the owner of land which is entitled to water from transferring the same amount of water to other land providing he thereby works no injury to others.

Id. at 665. This holding was reiterated on similar facts in *Horner v. Kumuliilii*, 10 Haw. 174 (1895).

In *Wong Leong v. Irwin*, 10 Haw. 265 (1896), the defendant had diverted water from one watershed to *kula* land in another watershed. The court held specifically that the owner of land with the appurtenant or prescriptive right to water could transfer that water to *any* other land, whether in the same watershed or in another watershed, so long as the water rights of others were not thereby compromised. *Id.* at 270-72. The same reasoning was followed in *Palolo Land & Improvement Co. v. Wong Quai*, 15 Haw. 554 (1903), although that case involved the transfer of water to land in a single watershed.

The next case in sequence of time was *Carter v. Territory*, 24 Haw. 47 (1917). *Carter* dealt with a controversy between *konohikis* of two *ahupuaas* over storm and freshet surplus water which on occasion ran in a stream passing through both *ahupuaas*. The court held that the *konohikis* must share these storm and freshet waters according to the principles of common law riparianism. Although the reasoning of the *Carter* court is highly unsatisfactory in this regard, the result is nonetheless defensible on the ground that in ancient times the Hawaiians rarely availed themselves of storm precipitation and that therefore no "Hawaiian usage" under HRS § 1-1 existed to supplant common law riparianism as to this class of water. *McBryde Sugar Co. v. Robinson*, *supra* at 205-06, 501 P.2d at 1318 (Marumoto, J., concurring and dissenting); *see* HUTCHINS 91. Regardless of the wisdom of *Carter* in terms of overall water policy, *see id.* at 91-98, its impact is "probably not of great practical importance in Hawaii, where the characteristic drainage areas are short and steep, where the flood waters of many streams come down in great quantities and flow for brief periods, and where practicable means of storing large quantities of flood water are not available." *Id.* at 95. Moreover, the holding of *Carter* has acquired over the course of more than half a century a special force as a rule of property law which is "long established and conformed to" and which therefore "should not be overturned" by this court. *In re Austin*, 33 Haw. 832, 839 (1936); *see* note 20 *supra*. The decision in *McBryde I* to overrule this aspect of *Carter* does violence to this basic principle of stare decisis.

The limited scope of the riparian doctrine announced in *Carter* was soon accentuated in *Foster v. Waiahole Water Co.*, 25 Haw. 726, 733-35 (1921), which held that *normal* surplus water was never appurtenant to any particular parcel of an *ahupuaa* or *ili kupono* and that it was freely conveyable by the *konohiki* apart from its land of origin. *Cf. In re Taxes Waiahole Water Co.*, 21 Haw. 679 (1913).

Finally, *Territory v. Gay*, 31 Haw. 376 (1930) applied *Wong Leong v. Irwin*, *supra*, to normal surplus water and held that the *konohiki* of the *ahupuaa* or *ili kupono* on which such

water arose could transport it wherever he wished, including to *kula* land in an entirely different watershed. In doing so, a divided court expressly rejected riparianism as applied to any other class of water than the storm and freshet surplus dealt with in *Carter*. *See* note 19 *supra*. As Mr. Chief Justice Perry incicated:

> While it is, perhaps, technically true that, as stated in the *Carter* case, "private water rights in Hawaii are governed by the principles of the common law of England except so far as they have been modified by or are inconsistent with Hawaiian statutes, custom or judicial precedent," that statement is of very little, if any, consequence or significance in view of the widely prevailing Hawaiian customs and the judicial precedents long since established with reference to water rights in this Territory. Our system of water rights is based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water. No modifications of that system have been engrafted upon it by the application of any principles of the common law of England.

31 Haw. at 394-95. In my opinion, the foregoing statement correctly articulates the relationship between Hawaiian water law and common law riparianism except in the limited circumstances of the *Carter* case, and therefore the court should adhere to it in lieu of the analysis of the subject contained in *McBryde I*.

IV. *THE UNCONSTITUTIONALITY OF McBRYDE I*

While the constitutionality of *McBryde I* was not one of the issues to which the court directed the parties to file briefs on rehearing, it is my opinion that the court should have dealt with this aspect of the case. In view of the wholly unexpected nature of the court's holdings in *McBryde I*, the parties of course could not have been expected to raise their constitutional claims as part of their appeals from the decision of the trial court. Since the parties asserted constitutional grounds for the reversal of *McBryde I* at the first possible instance — in their petitions for rehearing — their arguments

in this respect are properly before the court, *cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930), and therefore I consider myself bound to discuss them here.

The due process clause of the fourteenth amendment to the Federal Constitution and article I, sections 4 and 18 of the State Constitution forbid the State from taking private property without just compensation. This prohibition speaks to all instrumentalities of state government equally, restraining the courts from engineering unconstitutional takings no less than the legislature. *See Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897). *See generally Shelley v. Kraemer*, 334 U.S. 1, 14-15 (1948), and cases cited therein.

Although as a general rule judges are free to overrule prior cases which changed circumstances and perceptions reveal to have been unwisely decided, there are constitutional limits on their power to do so. *Compare Brinkerhoff-Faris Trust & Savings Co. v. Hill*, *supra* at 681 n.8 (Brandeis, J.) *with Hughes v. State of Washington*, 389 U.S. 290, 294 (1967) (Stewart, J., concurring). *See generally Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). In particular, when prior judicial precedent has established unequivocally a certain property right, a court may not subsequently declare that the right never existed when the consequence of such a holding is to frustrate the expectations of parties who justifiably relied on prior law in the management of their affairs. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Muhlker v. New York & Harlem R.R.*, 197 U.S. 544 (1905); *cf. N.A.A.C.P. v. Alabama*, 357 U.S. 449, 454-48 (1958).

Water rights associated with the ownership of land have always been regarded as property in Hawaiian jurisprudence. *See Peck v. Bailey*, 8 Haw. 658, 661-62 (1867); *Kaneohe Ranch Co. v. Ah On*, 11 Haw. 275 (1898). Specifically, the cases discussed previously in this opinion have held uniformly and without ambiguity that the successor in interest to the *konohiki* of an *ahupuaa* takes full title to all surplus water arising on his land, see pt. II.C. *supra* and that the same right devolves upon the successor in interest to the *konohiki* of an *ili kupono*. *Territory v. Gay*, *supra*. Likewise, prior case law

in this jurisdiction has established with clarity that privately owned water is freely transferable to lands other than those to which it is appurtenant. *See* pt. III.D.2. *supra*. Gay and Robinson has expended large sums of money in the development and transportation of the surplus water which prior decisions of this court indicated that it owned, and the other private parties to this action have purchased their land, invested in irrigation systems, and entered into contractual relationships with buyers of water, all in reliance of the principle of tree transferability of water rights espoused by a long line of Hawaii cases. In the circumstances, the decision of *McBryde I* that surplus water is owned by the State and that private water rights are appurtenant exclusively to the parcels of land on which they originate must be viewed as a retroactive "taking" of property theretofore recognized as privately owned.

A case in point is *Muhlker v. New York & Harlem R.R.*, *supra*. In 1888, Muhlker bought a plot adjacent to a strip of land used for surface-level railroad tracks. In 1891, he erected a five story building on his parcel, at a time when the existing case law of New York held that a property owner's easements of light and air could not be acquired through prescription by a railroad company whose tracks were on the ground level of an adjacent piece of land. Muhlker sued to enjoin the railroad from erecting an elevated railroad which would have interfered with these easements, and an injunction was issued by the trial court and affirmed by the Appellate Division of the Supreme Court on the basis of the prior New York cases directly in point. The New York Court of Appeals, however, reversed in an opinion which in function overruled the prior cases and held that Muhlker's easements of light and air could be eliminated without compensation. This decision was in turn reversed by the United States Supreme Court on the ground that in overruling its prior cases, the New York Court of Appeals effectively took Muhlker's property rights (the easements of light and air) in violation of the fourteenth amendment. The Court noted that prior New York precedents establishing these rights were unambiguous, and that Muhlker had bought his land and made

improvements thereon in reliance on the assurances of these precedents. This coalescence of well-established property rights and Muhlker's genuine reliance on the permanency thereof meant that the New York courts could not eliminate those rights without compensation, even though as a policy matter such a holding might be advantageous to the people of the state.

In a subsequent decision, *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 75 (1915), the Court held that the doctrine of *Muhlker* extended to property rights "pertain[ing] closely to the use and enjoyment of land," but not to the right to maintain artificial structures inherently inimicable to the rights of other property owners. Other cases indicated that a judicial decision does not constitute an unconstitutional taking of property unless it cannot be reconciled with prior unambiguous holdings on the subject. *Compare Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944) *with Brinkerhoff-Faris Trust & Savings Co., supra*. Only if the judicial decision is a "perverse reading of [prior] law," will the limitation on property rights effected by it be deemed an unconstitutional taking. *O'Neil v. Northern Colorado Irrigation District*, 242 U.S. 20, 26 (1916) (Holmes, J.); *see St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U.S. 349, 371 (1897) (the test is whether the new case is "inconsistent with or opposed to any of [the court's] former decisions").

Notwithstanding their limits, the basic principles of *Muhlker* still stand, as the concurring opinion of Mr. Justice Stewart in *Hughes v. State of Washington*, 389 U.S. 290, 294 (1967), illustrates. *Hughes* was an action by Mrs. Hughes, owner of upland property that had been conveyed by the United States prior to Washington's statehood, against the State of Washington. At issue was title to accretions which had formed over the years on Mrs. Hughes' property by the ocean. Mrs. Hughes based her case on a Washington Supreme Court decision which held twenty years previously that title to gradual accretions vested in the owner of land adjoining the ocean; however, the Washington Supreme Court in her case overruled the prior decision and held that

such accretions belonged to the state.

On certiorari to the United States Supreme Court, eight of the justices concluded that the decision in Mrs. Hughes' case should be reversed on the ground that title to accretions to land granted by the United States was governed by federal, not state law, and that under the federal decisions the owner of adjacent land also owned any accretions thereto. It was the opinion of Justice Stewart, however, that federal law controlled the disposition of only those accretions which formed on Mrs. Hughes' land prior to Washington's statehood in 1889. For accretions which formed thereafter, he concluded, state law governed.

Justice Stewart was therefore forced to consider whether the reversal by the Washington Supreme Court of its prior opinion on the subject of title to accretions constituted a taking without just compensation of Mrs. Hughes' property interest in post-1889 accretions to her land. He indicated the appropriate line of analysis to be as follows:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

Id. at 296-97.

After a review of relevant Washington case law, Justice Stewart found the *Hughes* decision to be a completely "unforseeable" departure from prior holdings. Moreover, he said:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not

> conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . .

Id. at 297-98.

There is no doubt in my mind that the observations of Justice Stewart in *Hughes* and the *Muhlker* holding are fully applicable to this case. That *McBryde I* is a totally unforseeable departure from prior cases of this court on the subject of water rights I have demonstrated elsewhere in this opinion. That the private parties to this action have relied considerably on these cases I have likewise indicated. Moreover, the decision in *McBryde I* on the questions of the ownership of surplus water and the transferability of privately owned waters affects the substantial and immediate enjoyment of the appellants' rights, not merely matters which are peripheral to those rights. Compare *Chicago & Alton R.R. v. Tranbarger*, *supra*.

McBryde I may or may not establish a better system for the regulation of water rights than the system that heretofore has evolved in this State. Perhaps government ownership and control of Hawaii's water resources would more effectively serve the public interest than private ownership. If this is so, then it is within the power of the State to appropriate these resources after the payment of reasonable compensation for their value. I cannot agree that it is constitutionally permissible for this court to perform the task without compensating

the appellants, based exclusively on the court's perception of what is best as a policy matter for the people of Hawaii.[39]

V. CONCLUSION

In accordance with the reasoning expressed in this opinion, I would overrule *McBryde I* and hold specifically as follows:

Gay and Robinson, as successor in interest to the *konohiki* of the *ilis kupono* of Manuahi and Koula, is entitled to all the normal surplus water, as defined in note 6 *supra*, of the Manuahi and Koula streams. All of the parties are entitled to the amounts of appurtenant water, as defined in note 4 *supra*, that were awarded by the trial court, except that the finding of the trial court that Gay and Robinson is entitled to appurtenant water rights for 90 acres of land in Koula and Manuahi should be set aside for the reasons expressed by this court in *McBryde Sugar Co. v. Robinson*, *supra* at 189-90, 504 P.2d at 1340. McBryde is not entitled to any prescriptive water, as defined in note 5 *supra*, for the reason stated by Justice Marumoto in his dissenting and concurring opinion in *McBryde I* that "[i]n the establishment of prescriptive right to water, adverse use does not run upstream." *Id.* at 205, 504 P.2d at 1348. Storm and freshet surplus water, as defined in note 7 *supra*, is to be apportioned between Gay and Robinson, McBryde and the State, as *konohikis* of *ili kupono* and an *ahupuaa* through which the water courses of the Hanapepe

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[39] As stated in Miller & Lux v. Madera Canal & Irrig. Co., 155 Cal. 59, 65, 99 P. 502, 512 (1909):

> Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain.

See also Palmer v. Railroad Comm'n, 167 Cal. 163, 175-76, 138 P. 997, 1001-02 (1914) (statutory declaration that all running water is property of the State cannot operate retroactively to deprive landowners of riparian rights recognized under prior law); Nielson v. Sponer, 46 Wash. 14, 89 P. 155 (1907) (accord).

Valley flow, according to the principles of riparian law announced in *Carter v. Territory*, *supra*. Finally, the rights of the various parties to normal surplus water or appurtenant water include the right to make transfers of that water to land both within and without the Hanapepe watershed, so long as the water rights of others are not thereby prejudiced.

Because a majority of this court cannot bring itself to accept the foregoing results as correct and consistent with well-established principles of Hawaiian water law, I dissent.

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING NO. 108
APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969
FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, *Judge*

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, et al., *Defendants-Appellees, Cross-Appellants.*

JUDGMENT ON APPEAL

Pursuant to the opinion of this Court filed and entered on January 10, 1973, the judgment of the Circuit Court of the Fifth Circuit is affirmed in part; reversed in part.

DATED: Honolulu, Hawaii, December 28, 1973.

BY THE COURT:
/s/ CLEMENT J. H. CHUN
Clerk

APPROVED:

/s/ KAZUHISA AI
Justice

[SEAL.]

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[Filed February 25, 1974]

No. 4879

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING NO. 108

APPEAL FROM FINAL JUDGMENT DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, *Judge*

MCBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, SELWYN A. ROBINSON, ELEANOR ROBINSON and LESTER B. ROBINSON, individually and as copartners doing business under the firm name of GAY AND ROBINSON, DEVISEES OF THE ESTATE OF ALICE ROBINSON, DEVISEES OF THE ESTATE OF SINCLAIR ROBINSON, OLOKELE SUGAR COMPANY, LIMITED, STATE OF HAWAII, et al., *Defendants-Appellees, Cross-Appellants.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that MCBRYDE SUGAR COMPANY, LIMITED, Plaintiff-Appellant above named, and OKOLELE SUGAR COMPANY, LIMITED, Defendant-Appellee above named, hereby appeal to the Supreme Court of the United States

from the final judgment entered in this action on December 28, 1973.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

DATED: Honolulu, Hawaii, this 25th day of February, 1974.

/s/ J. RUSSELL CADES
J. Russell Cades

/s/ ROBERT B. BUNN
Robert B. Bunn

Attorneys for McBryde Sugar Company, Limited

Of Counsel:

CADES SCHUTTE FLEMING & WRIGHT

/s/ WILLIAM F. QUINN
William F. Quinn
Attorney for Olokele Sugar Company, Limited

Of Counsel:

GOODSILL, ANDERSON & QUINN

[Certificate of Service omitted in printing]

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Nos. 73-1440, 73-1441, 73-1442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

McBRYDE SUGAR COMPANY, LIMITED, and OLOKELE SUGAR COMPANY, LIMITED, *Appellants*,

v.

STATE OF HAWAII, ET AL., *Appellees*.

SELWYN A. ROBINSON, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

IDA ALBARADO, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF HAWAIIAN SUGAR PLANTERS' ASSOCIATION AND BRIEF

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IN THE

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On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF HAWAIIAN SUGAR PLANTERS' ASSOCIATION

Comes now HAWAIIAN SUGAR PLANTERS' ASSOCIATION and respectfully moves the Court for entry of an

order granting leave to file the attached brief in support of the jurisdictional statement and petitions for writs of certiorari in the above cases. Counsel for all appellants and petitioners have consented to the filing of the brief. Although requested to do so, appellee and respondent State of Hawaii has declined to consent.

HAWAIIAN SUGAR PLANTERS' ASSOCIATION is an unincorporated association whose members include all sugar plantations engaged in sugar production in Hawaii.

The continued successful operation of most of those plantations is directly dependent upon their right to continued use of water sources and irrigation facilities developed and relied upon, as the key to successful agricultural enterprises, during the past one hundred years. The opinion of the Hawaii Supreme Court drastically changes the law relating to ownership and transportability of water in Hawaii. It would also destroy the value of privately owned water sources and distribution systems developed during a century of governmental encouragement under the protection of laws respecting private ownership and use of water resources.

Movant seeks leave to file the attached brief to emphasize aspects of the questions before the Court different from those presented by the parties, illuminating the substantiality of the Federal questions involved. The brief stresses the importance of the domestic sugar industry to the national and international interests of the United States and the adverse impact the State court judgment will have upon that industry,

contrary to declared Federal policy as embodied in United States statutes.

Respectfully submitted,

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IN THE

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STATE OF HAWAII, ET AL., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

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BRIEF OF AMICUS CURIAE, HAWAIIAN SUGAR PLANTERS' ASSOCIATION, IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT AND PETITIONERS' REQUESTS FOR WRITS OF CERTIORARI

This brief amicus curiae is submitted on behalf of HAWAIIAN SUGAR PLANTERS' ASSOCIATION ("HSPA")

in support of appellants' and petitioners' jurisdictional statement and petitions for writs of certiorari in the captioned cases.

INTEREST OF THE AMICUS CURIAE

HSPA is an association of all plantation companies engaged in sugar production in Hawaii and individuals directly concerned with the Hawaiian sugar industry. Organized in 1882 to promote the sugar industry of Hawaii, it has been responsible for scientific improvements enabling Hawaii to be a leader in agronomic efficiency. Research carried on by its Experiment Station has led to the development of such disease resistant and productive varieties of cane that Hawaiian plantations produce more sugar per acre than any others in the world.[1] Currently the Association is engaged in intensified research to develop efficient methods of utilizing the vast amounts of water required to irrigate cane. In the case presented for review, the Hawaii Supreme Court astounded the agricultural and legal communities in Hawaii by overturning a century of precedents to hold that surplus water is not owned by the owner of the land on which it arises and that water can be used only on the land to which it is appurtenant or riparian. The decision, if unmodified, will severely cripple the Hawaiian sugar industry. The HSPA, therefore, urges review and reversal of that decision.

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[1] Hawaiian Sugar Planters' Assoc., Sugar Manual, 4 (1973). HSPA annually invests nearly as much as does the U.S. Government in research on sugar; that is, about $2.5 million as compared with $3.0 million. U.S. House of Representatives Committee on Agriculture, The United States Sugar Program (hereinafter cited as "Sugar Program"), 4 (1970). HSPA is principally supported by assessments levied upon its plantation members.

ARGUMENT

Sugar Production Is Federally Regulated in the Public Interest.

The fate of the Hawaiian sugar industry is not merely a local problem; it is a matter of national concern.

Sugar has been a regulated commodity since the first Act of the First Congress of the United States, which imposed a tariff upon imported sugar as a revenue producing measure.[2] Excepting only four years beginning in 1890, sugar has been a duty import ever since. More importantly, for the past forty years the supply of sugar to the United States has been rigidly controlled by Congress.[3] The principal aims of this control have been to assure an adequate supply of sugar to the U. S. market at reasonable prices and to protect and maintain the domestic sugar industry. The Sugar Act has been characterized by the Chairman of the U.S. House of Representatives Committee on Agriculture as "one of the most comprehensive and complex agricultural laws within the legislative responsibility of this committee".[4] The international im-

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[2] Act of July 4, 1789, 1 Stat. 24.

[3] Jones-Costigan Act, 48 Stat. 670 (1937); Sugar Act of 1937, 50 Stat. 903, as amended and extended; Sugar Act of 1948, 61 Stat. 922, as amended and extended through 1974. Congress is now holding hearings on another extension and amendments. *United States* v. *Butler*, 297 U.S. 1 (1936), ruled that the Jones-Costigan Act tax on processors of agricultural commodities was unconstitutional when used as a device to control production. The quota system was left in effect, however, and constitutional objections were later removed by separating the processing tax and compliance payments.

[4] Sugar Program, *supra* note 1, Foreward.

portance of the Sugar Act is emphasized by the 1962 amendments[5] which provided for reallocation of the quota of any foreign country with which the U. S. is not in diplomatic relations.

Under the market division established by federal law, Hawaii's share for 1973 was nearly 10% of the annual sugar consumption of the U. S. and approximately 18% of the domestic sugar produced for U. S. consumption.[6] Any threat to a sugar supply of the magnitude furnished by Hawaii to the U.S. market would contravene national policy, as declared by the House Committee on Agriculture, to preserve within the United States the ability to produce a substantial portion of the country's sugar requirements.[7] Further, income to the government from the tax on sugar marketed within the quota system has exceeded amounts disbursed for support of the sugar program by more than $630 million and continues to provide a "net" revenue of about $20 million per year.[8]

The policy of Congress to promote sugar production in Hawaii has been evident for nearly a century. The sugar tariff, while essentially a revenue measure, afforded significant protection in the U. S. market to domestic producers. By the Treaty of Reciprocity of 1876,[9] between the United States and the Kingdom of Hawaii, this protection was extended to Hawaii. The

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[5] Sugar Act Amendments of 1962, 76 Stat. 156.

[6] U.S. Dept. of Agriculture, Sugar Reports No. 260, at 16 (1974).

[7] Sugar Program, *supra* note 1, at 29.

[8] Sugar Program, *supra* note 1, at 27.

[9] Treaty of Reciprocity of 1876 with Hawaii, June 3, 1875, 19 Stat. 625.

opportunity thus provided to Hawaiian growers was fully exploited. Within ten years, Hawaiian production increased from 13,000 to 100,000 tons. After another 45 years, annual production passed the 1,000,000 tons mark.[10]

Transfer of Water Has Had Governmental Recognition and Encouragement.

The growth of the industry in the nearly 100 years since the Treaty of Reciprocity has been due, in a large measure, to consistent encouragement and assistance given by the governments of Hawaii and the United States. During that period the water law firmly crystalized and promoted extensive development and use of water in sugar production through recognition that (1) ownership of surplus surface waters inhered in the ownership of the units of land within which those waters had their origin,[11] and (2) water lawfully acquired could be used on any land, irrespective of its source or ancient use, so long as the diversion did not injuriously affect the rights of others.[12]

In 1876, concurrently with the enactment of legislation to implement the Treaty of Reciprocity, the

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[10] U.S. Dept. of Agriculture, Agricultural Economic Report, No. 197, at 9 (1971); Sugar Manual, *supra* note 1, at 13.

[11] Maikai v. Hastings, 5 Haw. 133 (1884); Davis v. Afong, 5 Haw. 216 (1884); Haw. Com. & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904); Carter v. Territory, 24 Haw. 47 (1917); Terr. v. Gay, 31 Haw. 376 (1930).

[12] Peck v. Bailey, 8 Haw. 658 (1867); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Horner v. Kumuliilii, 10 Haw. 174 (1895); Wong Leong v. Irwin, 10 Haw. 265 (1896); McBryde Sugar Co. v. Andrade, 22 Haw. 578 (1915). There is abundant evidence of ancient Hawaiian practice of diverting water by ditch systems; see, e.g., Hilo Boarding School v. Territory, 23 Haw. 595, 599 (1917) and Rec. Doc. 65, 95 and 96.

Legislative Assembly of the Kingdom of Hawaii passed two statutes to promote the construction of irrigation ditches. The first of these recognized private ownership of water and established a procedure for condemnation, by private parties as well as by government, of rights of way for irrigation ditches, canals and flumes.[13] The other was entitled "An Act to Aid the Development of the Resources of the Kingdom".[14] It contained recitals of legislative policy favoring irrigation to make land productive for sugar cane, provided for government construction and financing of irrigation works and called for the condemnation of privately owned water and use of government owned water as necessary.

Five days after passage of the last-mentioned act, the Minister of the Interior, carrying out the government policy expressed by these statutes, granted a 20-year license to Haiku Sugar Company to take all waters from streams or other sources on identified government lands forming the rainy eastern slope of Mt. Haleakala and to build facilities to collect and divert those waters.[15] Completed in two years at a cost of $80,000, this aqueduct collected and conveyed water through a 10-mile stretch of government and private lands from rain forests to arid plains.[16] Enlarged un-

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[13] Act 27, Laws of 1876. Section 1 provided that "(w)henever any person, having a right to any water, shall be desirous of leading the same on to any land in his possession for the purpose of irrigation and other uses" he could institute the statutory procedure to acquire a right of way.

[14] Act 53, Laws of 1876.

[15] Rec. Doc. 65, App. 2, 1.

[16] Rec. Doc. 65, App. 1, 1; Dean, Alexander & Baldwin and the Predecessor Partnership 4 (1950); Hawaiian Planters' Record, Vol. 37, No. 3, at 144-45 (1933).

der later licenses and leases,[17] this system now comprises 74 miles of ditches, tunnels and flumes with a delivery capacity of 455 million gallons per day of water contractually differentiated as "public" and "private" water. Approximately 62 billion gallons are delivered annually through this system; that is, the equivalent of 6 acre feet of water for the entire 31,000 acres of Hawaii's largest sugar plantation.[18]

Hawaiian government policy to foster private construction of irrigation facilities was continued through a provision in the 1894 Constitution of the Republic of Hawaii authorizing condemnation of private rights of way for irrigation facilities[19] and a legislative act of 1895 setting forth the procedure for such acquisitions.[20] In the same period and of greater significance was the 1894 reimposition, by the United States, of the tariff on foreign sugar. This had been lifted in 1890 and Hawaii, which did not share in the government bounty given domestic growers, had been badly hurt by loss of its preference over other foreign producers. One of the reasons for reimposition of the tariff was to restore Hawaii to its preferred status in the U. S. market.[21]

Congress Has Recognized Private Ownership of Water and the Right To Transport It for Beneficial Use.

Hawaii was annexed to the United States in 1898. Until it became a State in 1959, the two principal United States statutes governing the Territory of Ha-

[17] Detailed at Rec. Doc. 65, App. 2, 1-7.

[18] Rec. Doc. 65, App. 1, 3.

[19] Republic of Hawaii Constitution, Art. 12 (1894).

[20] Act 18, Laws of 1895.

[21] Sugar Program, *supra* note 1, at 30.

waii and its public lands were the Hawaiian Organic Act[22] and the Hawaiian Homes Commission Act, 1920.[23] Both contained provisions recognizing the existence of privately owned waters and long-standing practices of conveying water from wet to dry areas for irrigation and domestic use. In the Organic Act, recognition of existing irrigation practices was expressed by an amendment including "rights of way for the transmission of water for irrigation" among public uses for which the power of condemnation could be exercised.[24] With this authority, the Territorial Legislature conferred the power of eminent domain on private irrigation corporations, believing it to be "necessary in the agricultural development of the country".[25]

The Hawaiian Homes Commission Act requires a percentage of Territorial government receipts from the leasing of sugar cane lands "or from water licenses" to be paid into a fund used for loans to native Hawaiians. This provision demonstrates Congressional acceptance of the government's practice of licensing its waters to plantation companies for irrigation use outside the watershed of origin.[26] The Act perceives a distinction between "Government-owned water" and

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[22] Act of April 30, 1900, 31 Stat. 141.

[23] Act of July 9, 1921, 42 Stat. 108.

[24] Act of May 27, 1910, s. 4, 36 Stat. 443.

[25] Act 124, Laws of Hawaii 1911; Senate Judiciary Report No. 227, Senate Journal, 1911 at 687.

[26] Act of July 9, 1921, s. 213, 42 Stat. 112. Many examples of leases and licenses of government owned water for irrigation and other uses outside the watershed of origin, spanning the period 1876-1970, are set forth in Rec. Doc. 65, App. 2, 1-7. Many leases of sugar lands also, by their terms, required the lessees to import water for sugar production. Rec. Doc. 65, App. 2, 7 and 8.

"privately owned water" and recognizes the need to use water upon lands other than those of its origin in authorizing the acquisition of water to supply the livestock or domestic needs of individuals upon *any* tract of Hawaiian Homes lands.[27] The statute also gave the Commission power to acquire the use of "any ditch or pipe line constructed for the distribution and control" of water needed for *any* Hawaiian Homes tract.[28] By an amendment in 1956, the Commission also had power to grant rights of way, exchange lands and do other things "[t]o enable the construction of irrigation projects which will service Hawaiian homelands."[29]

The Hawaiian Homes Act was required to be, and was, adopted as a part of the Constitution of the State of Hawaii.[30] Hawaii accepted this condition in the act admitting Hawaii into the Union, "as a compact with the United States," that the Hawaiian Homes Act would not be amended in the particulars mentioned except through action of the Legislature of Hawaii, concurred in by the United States. It does not lie within the power of the Hawaii Supreme Court to rewrite that Act or, by judicial fiat, to render its provisions meaningless.

Hawaiian Sugar Production Is Dependent Upon Irrigation.

The rulings of the Hawaii Supreme Court, unless modified, will dry up the extensive irrigation systems on which most Hawaii plantations are absolutely de-

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[27] Act of July 9, 1921, secs. 221(a) and (b), 42 Stat. 112.

[28] Id. sec. 221(e).

[29] Act of August 1, 1956, 70 Stat. 915.

[30] Act of March 18, 1959, sec. 4, 73 Stat. 4; State of Hawaii Constitution, Art. XI (1959).

pendent. The east Maui irrigation system, briefly described above, is only one of a great number of such systems existing on every island where cane is grown. Collectively these systems deliver an average of more than 550 million gallons daily.[31] There are about 232,000 acres in sugar cane cultivation in Hawaii, including 16 plantations and 557 independent-grower farms.[32] While only about one-half is irrigated, the irrigated acreage produces two-thirds of the annual crop and most of it could not economically be farmed if it was deprived of irrigation. Sugar is the largest agricultural industry in Hawaii, is the third largest revenue producer in the State and accounts for nearly sixty per cent of Hawaii's export revenue. The annual payroll for more than 10,000 year-round sugar industry employees, who are the highest paid agricultural workers in the world, exceeds $80 million.[33] These statistics verify that continued vigor of the sugar industry is absolutely essential to the economic health of the State of Hawaii and to the vitality of the national sugar program regulated by Congress.

CONCLUSION

The constitutional questions raised by appellants and petitioners are of immediate and critical impor-

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[31] Rec. Doc. 56, Affidavit, 3 and 4; that is, about one and one-half times the 1971 daily average water consumption of the City of Philadelphia. Brief descriptions of some of these irrigation systems may be found in Rec. Doc. 65, App. 1, 1-9; The Cane Sugar Industry, Dept. of Commerce Misc. Series No. 53, at 74-78 (1917); and The Hawaiian Planters' Record, Vol. 37, No. 3, at 144 *et seq.* (1933).

[32] Rec. Doc. 56, Affidavit, 2; that is, approximately 5 times the land area of the District of Columbia.

[33] Rec. Doc. 56, Affidavit, 1 and 2; Sugar Manual, *supra* note 1, at 6.

tance, meriting review by this Court, inasmuch as national policy and State interest mandate preservation of the Hawaiian sugar industry. The decision of the Hawaii Supreme Court has overruled more than a century of established water law and usage. Unrelenting application of the novel concepts announced in that decision would imperil the sugar industry as well as destroy confidence in the fairness of the Hawaiian judicial process.

Probable jurisdiction of the appeal should be noted and writs of certiorari should be granted.

Respectfully submitted,

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March, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

MCBRYDE SUGAR COMPANY, LIMITED, and
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vs.

STATE OF HAWAII, et al., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

OBJECTION OF THE STATE OF HAWAII TO MOTION OF HAWAIIAN SUGAR PLANTERS' ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The State of Hawaii hereby objects to the motion of Hawaiian Sugar Planters' Association for leave to file brief amicus curiae, which was served on April 1, 1974:

a. Movant, Hawaiian Sugar Planters' Association, is an unincorporated association whose members include all sugar plantations engaged in sugar production in Hawaii, of which association the parties to this action are members, thus, the interests of petitioner are the same as those of the parties to this action.

The motion of movant, Hawaiian Sugar Planters' Association does violence to the law of *amicus curiae*. In *Re Ohlhauser's Estate,* 101 N.W.2d 827, 829 (1960), the court stated:

> "We find the term 'amicus curiae' literally means 'a friend of the court'. It ordinarily implies the friendly intervention of counsel to call the court's attention to a legal matter which has escaped or might escape the court's consideration. The right to be so heard is entirely within the court's discretion. It is a privilege and not a right. An amicus curiae, in fact, has no legal standing in court. *He cannot be partisan. . . .*" (Emphasis added).

A pertinent part of the motion of movant reads:

> "Hawaiian Sugar Planters' Association is an unincorporated association whose members include all sugar plantations engaged in sugar production in Hawaii. The continued successful operation of most of those plantations is directly dependent upon their right to continued use of water sources and irrigation facilities developed and relied upon, as the key to successful agricultural enterprises during the past one hundred years."[1]

Movant seeks to appear in the case as a party and a partisan aligned with the appellants and petitioners and not as a friend of the court. Movant is too

[1] "Motion for Leave to File Brief Amicus Curiae of Hawaiian Sugar Planters' Association" p. 2.

partisan to be anything other than an intervenor. Thus, said motion is without merit.

b. All facts and questions relative to the interest of the sugar plantations should be adequately presented to the Court by the parties.

Far from affording assistance to this court on the decisive issues, the brief amicus curiae, instead, merely emphasizes the importance of the sugar industry. Thus, the brief amicus curiae appears of little judicially cognizable import and to an extent is repetitious of that of the parties.

c. The opinion of the Supreme Court of the State of Hawaii relating to the ownership and transportability of water in Hawaii does not have such a far-reaching adverse effect upon the sugar industry.

d. Petitioner did not participate in the proceedings before the Supreme Court of the State of Hawaii as amicus curiae.

CONCLUSION

For the foregoing reasons we respectfully submit that the motion of Hawaiian Sugar Planters' Association for leave to file a brief amicus curiae be denied.

Dated, Honolulu, Hawaii,
May 23, 1974.

Respectfully submitted,

GEORGE PAI,
Attorney General, State of Hawaii,

By JOHNSON H. WONG,
Deputy Attorney General,

Attorneys for Appellee-Respondent State of Hawaii.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

McBRYDE SUGAR COMPANY, LIMITED, and
OLOKELE SUGAR COMPANY, LIMITED, *Appellants,*

vs.

STATE OF HAWAII, et al., *Appellees.*

SELWYN A. ROBINSON, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

IDA ALBARADO, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

---

RESPONSE TO, JURISDICTIONAL STATEMENT OR, IN THE ALTERNATIVE, PETITIONS FOR WRIT OF CERTIORARI

ARGUMENT

The Supreme Court of Hawaii did not affect the vested rights of the petitioners by their decision.

> "It is universally held that real or immovable property is exclusively subject to a law of the... state in which it is situated, and no interference with it by the law of any other sovereignty is permitted." *Commissioner of Internal Revenue v. Skaggs,* 122 F.2d 721, 723 (1941) Cert. den. 315 U.S. 811, 62 S.Ct. 796, 86 L.Ed. 1210.

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938).

The Supreme Court of Hawaii, acknowledging the importance of their decision in the case below, said:

> "This Court, like the United States Supreme Court has 'rejected a doctrine of disability at self correction'".[1]

The Supreme Court of Hawaii for the first time construed §7-1, Hawaii Revised Statutes, in determining the rights of the parties to appurtenant, riparian and all surplus waters and clearly defined water rights laws which were in the shaded area as a result of *Territory v. Gay,* 31 Haw. 376 (1930), where the three justices differed on the law.

The Supreme Court of Hawaii, in reaching their decision, reflected back to the time of the *Great*

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[1]All references to appendix made herein refer to "Joint Appendix to Jurisdictional Statement and Petitions for Writs of Certiorari" submitted on behalf of Appellants and Petitioners. Decision (App. 72)

Mahele of 1848, reviewed the decisions made by the same Court in other cases[2], reviewed the principles of the Land Commission before ruling that no one may acquire property to running water in a natural watercourse.

The ancient laws of Hawaii, and Chapter 7, Hawaii Revised Statutes, which was in existence since 1850, make it abundantly clear that the owners of land, having either or both riparian or appurtenant water rights, have the right to the use of the water but no property in the water itself.

This construction of a rule of property, decided by this State's highest tribunal, is binding on all federal courts and should not be overturned.

Moreover a line of decisions may not be a rule of property where it disregards the expression of the statute.

In *Patterson v. McCormick,* 99 S.E. 401, 405 (1919), the Supreme Court of North Carolina was faced with construction of a will which could have been decided adversely to the plaintiffs were it not for a statute which changed the common law. The Court there said:

> "'Where the statute is explicit and has been overlooked, the doctrine of stare decisis does not apply'. . . . When the statute and the precedents conflict the statute controls. The Courts cannot by a line of erroneous decisions overrule the statute."

---

[2]See *Peck v. Bailey,* 8 Haw. 658 (1867), *Haw. Com. & Sugar Co. v. Wailuku Sugar Co.,* 15 Haw. 675 (1904), *Carter v. Terr.,* 24 Haw. 47 (1917)

In *Baumann v. Smrha,* 145 F.Supp. 617, 625 (1956), the Court said:

> "There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law.
>
> "Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment."

In Re Catherwood's Trust, 173 A.2d 86, 93 (1961) the question presented was the constitutionality of the retrospective application of the Uniform Principal and Income Act with respect to trusts created prior to the date of the Act.

The Court said:

> "Over a century ago the Pennsylvania Rule of Apportionment was created: great and distinguished jurists contributed to its creation and formulation of its principles. The purpose and aim of the Rule was commendable: it sought, and was generally acknowledged to have achieved, an equitable adjustment of the rights of both life tenants and remainderman. Over sixteen years ago, faced with drastic changes in our economy and other factors which rendered unworkable the Rule, the legislature in its wisdom abolished the Rule and substituted a new Rule in its place. Our only task is to determine whether the legislative enactment can constitutionally apply to trusts created prior to its passage.

> *Crawford* found it could not and *Pew and Warden* followed *Crawford*. We have reexamined these decisions and disagree with the results reached. The legislative enactment did not modify or extinguish any vested property rights. There is no vested property rights in a court-made rule of apportionment. The experience under the *Crawford* rule teaches us it cannot justly be applied and, therefore, we overrule *Crawford* followed in *Pew and Warden*."

In much the same manner as the cases cited above there can be no vested property rights in judicial decisions which are contrary to the express wording of a statute which has been in existence in Hawaii since 1850.

An examination of some of the early decisions of this state involving water rights would show why reasonable men should not be allowed to rely on these decisions.

Peck v. Bailey, 8 Haw. 658 (1867) was an opinion by a single justice of the Supreme Court sitting in equity.[3] Basically this case was an action brought by complainants seeking paramount title to the water and relief from defendants' illegal diversion of water to *kula* land.[4] The Court was of the opinion that:

> "[i]f any of the lands were entitled to water by immemorial usage, this right was included in

[3]Chapter XIII, Civil Code 1859, § 827 provided that the Supreme Court shall consist of a Chief Justice and two associates, any of whom may hold the Court. The decision could have been appealed to the full Court.

[4]Land not having ancient water rights in contrast to *kalo* land or taro land having ancient water rights.

> the conveyance (by the King) as an appurtenance." *Supra* at 661.

The Court further reasoned that both parties are:

> "limited in their rights of water, and there is not the slightest ground for declaring either as lords paramount . . . " *Supra* at 663.

As to the issue of transferring water from *kalo* patches to *kula* land, the Court declared that if the use is reasonable and the change does not injuriously affect the rights of others, the transfer is not illegal.

However, the basis for the decision apparently is that the complainants had not sustained the allegation that there had been injury as to them and secondly, if any injury had occurred, the complainant contributed to the deficiency in the Wailuku river by the enlargement of the *Kalaniauwai* (a water course from the Wailuku river).

Moreover the transfer by the defendants was:

> "limited to the same quantity of water to which he was entitled on his *kalo* land by immemorial usage." *Supra* at 666.

There was no basis in law or reason for supposing that any water rights acquired by immemorial usage was included in the conveyance by the King to the tenants as an appurtenant right. Moreover, the decision vacillates from Hawaiian usage concerning water rights to hints of riparian water rights at common law.

All of this occurred seventeen years after the passage of the act governing water rights in Hawaii following the *Great Mahele*.

In *Horner v. Kumuliilii,* 10 Haw. 174 (1895), the Court said:

> "The right to use the water on a certain land . . . being established by prescription gives the owner of the land so far forth the right to use that water as he chooses, and he may allow part of it or all of it to be used elsewhere, provided this diversion does not injuriously affect others. The principle that water may thus be diverted has been abundantly established by decisions of this Court." Citing, *Peck v. Bailey,* 8 Haw. 658; *Kahookiekie v. Keanini,* 8 Haw. 310; *Lonoaea v. Wailuku Sugar Co.,* 9 Haw. 651.

In the *Kahookiekie* case supra, the Court there said "Without deciding the question whether a water right by prescription to be used upon certain land could be diverted to and used upon another piece of land, we are of the opinion that to do this, as defendant has done, is a manifest injury to the plaintiff." *Supra* at 312.

In *Wong Leong v. Irvin,* 10 Haw. 265, 270-272 (1896), it is stated that insofar as the transfer of water from one *ahupuaa*[5] to another *ahupuaa* was concerned, it may be lawful either under the common law or by ancient Hawaiian usage. The Court reasoned that once a prescriptive right ripens into a superior right, other proprietors of the water should have no more concern in the use of the water.

> "So far as the argument rests upon Hawaiian usage, it is based on the statement that such transfers were not made in ancient times. But

[5]Largest unit of land divisions in the Hawaiian Land system.

> this is quite different from a statement that such transfers could not be made . . . . [W]e do not know as a fact that such transfers were never made in ancient times."

Thus, there came into existence a body of case law, erroneously decided, by the failure to consider an existing statute. But the impact of those decisions did not become crucial to the determination of water rights law until the Territory sought a definite ruling in later cases.

In *Territory v. Gay*, 31 Haw. 376 (1930), the Court decided the issue relating to the surplus of water not required for lower prescriptive or appurtenant rights. Three justices comprised the Supreme Court then and each gave separate opinions on the question presented. Chief Justice Perry said that save for one feature of the *Carter*[6] case relating to freshet waters:

> "[I]t is not and never has been the law in Hawaii. It (common-law doctrine of riparian rights) is utterly inconsistent with the system which from time immemorial has been recognized and enforced in these islands. Its adoption now with reference to normal surplus waters would alter established rights. * * * After a careful reexamination of all Hawaiian cases relating to water law I find none except the *Carter* case, *supra*, which makes any award of riparian rights as such." *Supra* at 396, 402.

Justice Parsons, concurring in part and dissenting in part, differed with the above opinion in the dis-

[6]*Carter v. Territory*, 24 Haw. 47 (1917).

approval of the *Carter* case, *supra*. He felt that the case was not necessary for determining the right of the respondents to continue to maintain the diversion of a part or all of the normal daily surplus of water.

> "In view of the fact that the right to surplus storm and freshet waters was directly in issue in the *Carter* case and of the fact that such right is not directly in issue in the case at bar, without expressing any view as to how the question should be ultimately determined I cannot concur in that portion of the opinion of the Chief Justice in the present case which, if concurred in, would overrule the *Carter* case in the particulars above set forth." *Supra* at 408.

Justice Banks in his dissenting opinion differed with the Chief Justice in the rule to be used concerning normal and storm surplus waters. He favored the adoption of the common law doctrine of riparian water rights and that the *Carter* case was not inconsistent and that the rule announced there was:

> "So inherently just in its regulation of the use of an element that is vital to the well being of mankind and is so consonant with natural rights and human necessities that I think it should be finally adopted as the law of this territory." *Supra* at 409.

Thus the three justices managed to agree that *Gay & Robinson* should have the "normal surplus waters" but the rule and justification for such a gift left the status of water rights law in limbo.

The Supreme Court of Hawaii in the instant case in reviewing the ruling in *Territory v. Gay* said that that decision was:

> ". . . made in a vacuum. Both the State and McBryde owning land abutting the Hanapepe River are entitled to riparian water rights over and above the appurtenant rights as determined by the trial court, and under the riparian doctrine they are entitled to the amount of flow of water in both the Koula Stream and Hanapepe River as water flowed in the stream and river at the time of the award without substantial diminution. In other words, they are entitled to have the flow of water in the Hanapepe River in the shape and size given it by nature. Thus, there can be no quantity of water which may be deemed 'normal daily surplus water' and Gay & Robinson is entitled to nothing under the ruling of that case."[7]

These decisions, from the *Peck* case *supra,* to the *Gay* case *supra,* never tried to reconcile the ancient Hawaiian water rights with riparian and appurtenant rights at common law, and Chapter 7, Hawaii Revised Statutes. The Supreme Court of Hawaii in the instant case clearly defined water rights law in view of said Chapter 7, which provides:

> "§7-1. *Building materials, water, etc.; landlords' titles subject to tenants' use.* Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking

[7]Decision (App. 91).

water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."[8]

CONCLUSION

For the reasons stated above, the writ should be denied.

Dated, Honolulu, Hawaii,
May 23, 1974,

Respectfully submitted,
GEORGE PAI,
Attorney General, State of Hawaii,
By JOHNSON H. WONG,
Deputy Attorney General,
Attorneys for Appellee-Respondent State of Hawaii.

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[8]Decision (App. 83, 84), See Enactment of Further Principles enacted by the Hawaiian Government on August 6, 1850, Law 1850, p. 202, and Section 577 of Revised Laws of Hawaii 1925, which now appears as Section 7-1, Hawaii Revised Statutes.

MAY 2
MICHAEL RODA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

MCBRYDE SUGAR COMPANY, LIMITED, and
OLOKELE SUGAR COMPANY, LIMITED, *Appellants,*

VS.

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SELWYN A. ROBINSON, et al., *Petitioners,*

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VS.

STATE OF HAWAII, et al., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF HAWAII

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On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF HAWAII

Appellee-Respondent, State of Hawaii, moves this Honorable Court to dismiss the appeal herein on the following grounds:

(1) The Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the Courts of Hawaii.

(2) The appeal does not present a substantial Federal question.

STATEMENT

In 1959, the present suit was instituted by McBryde Sugar Company, Limited ("McBryde") pursuant to Part III, Chapter 664, Hawaii Revised Statutes, to adjudicate the ownership of all waters of the Hanapepe Valley basin.

At the hearing before the trial Court, appellants and petitioners did not raise any Federal Constitutional questions, and the trial Court, on December 10, 1968, made a determination of the water rights of the landowners.[1] Although the trial court noted that diversions of water had occurred, the Court did not reach the legality of such diversions.[2]

Separate appeals to the Supreme Court of Hawaii were filed by McBryde, Gay & Robinson and the State of Hawaii, but no Federal Constitutional questions were presented. The issues involved were questions

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[1]All reference to appendix made herein refers to "Joint Appendix to Jurisdictional Statement and Petitions for Writs of Certiorari" submitted on behalf of Appellants and Petitioners. Decision (App. 4); Conclusions of Law No. 13 (App. 55-57).

[2]Decision, Findings 11 and 15 (App. 7, 8-9); Finding 30 (App. 13).

concerning the rights of landowners to appurtenant, riparian and surplus waters.

The brief of appellant McBryde Sugar Company, Limited, in the Supreme Court stated the questions as follows:

"QUESTIONS PRESENTED

1. Under Hawaiian law, what is the standard for determining lands entitled to ancient appurtenant water rights?
2. Can lands used for taro cultivation from time immemorial be denied an ancient appurtenant water right because they were not actually under taro cultivation on the date of the Land Commission Award, where there has been no proof of abandonment of the immemorial right and no proof of prescriptive use of those waters by others?
3. What lands, in addition to those found by the trial court to have ancient appurtenant water rights, are entitled to such a water right and, conversely, what lands held by the trial court to be entitled to ancient appurtenant rights are not so entitled?
4. What is the proper measure of the water duty of lands having ancient appurtenant rights in this case?
5. Is it proper to reduce the water duty of each acre of taro land found by the trial court to have an ancient appurtenant water right based upon usage of such lands for the cultivation of taro at the time of the Land Commission Awards by one-third to allow for either: (a) the fact that other lands, watered

by Hawaiian custom from time immemorial, were not actually in cultivation (that is, were fallow) at the time of the Land Commission Awards; or (b) for the fact that, in the opinion of the trial court, at least one-third of the very lands of the trial court had held were entitled to an ancient appurtenant water right were at all times lying fallow at the time of the Land Commission Awards (probably because of the decline in population at that time)?

6. Are prescriptive water rights to the flow of a stream to be measured only as of the driest five days in the whole fourteen-year three-month prescriptive period, or are such rights to be measured in normal dry weather flow conditions, and also at other flow conditions of the stream, based upon the actual proof of prescriptive usage at various river flow states over the entire prescriptive period?

7. What additional prescriptive water rights of McBryde should be awarded at each flow stage of the Hanapepe River?

8. Were certain of the water flow, diversion, and measurement figures adopted by the trial court erroneous?

9. Did the trial court err in refusing to follow the rule of *Carter v. Territory,* 24 Haw. 47 (1917) regarding the rights of owners of ahupuaas or ilis kupono along a stream to share in the storm and freshet waters of the stream pursuant to the doctrine of riparian rights and in refusing to award McBryde its riparian rights in the storm and freshet waters of Hanapepe stream?

10. Under the record in this case, what is the dividing line between the normal daily surplus flow of the stream (owned by G&R) and the storm and freshet surplus flow of the stream (to be shared by G&R, the State and McBryde)?
11. If this court decides to overrule *Carter v. Territory,* what rule of law should be established for surplus waters?"

The brief of Gay & Robinson stated the questions on appeal as follows:

"QUESTIONS PRESENTED

1. Did McBryde, by taking water belonging to the State and other land owners, for a 10-year period acquire a prescriptive right to take the water which G&R was entitled to and in fact continued to take during the 10-year period?
2. Did the circuit judge err in enjoining G&R from diverting an unascertained quantity of water contrary to HRCP 65(d)?
3. Did the circuit judge err by making a double allowance for ditch losses allowing each owner of appurtenant water rights to take 50,050 gpapd (gallons per acre per day) measured at any point along or at the end of the ditches as well as at the point the ditches divert water from the river, when the court had already increased the rights of these owners 15% to allow for the losses in ditches in arriving at the figure of 50,050 gpapd?"

The brief of the State of Hawaii stated the questions on appeal as follows:

"STATEMENT OF THE QUESTIONS INVOLVED

1. What is the quantum of proof necessary to show that certain lands were in taro cultivation since time immemorial and as such are entitled to appurtenant water rights?
2. What is the quantity of water necessary to raise taro as it was done in ancient time as measured in gallons per acre per day?
3. Where land is claimed to be ancient taro land which is entitled to appurtenant water right, what is the critical period that such land must have been in taro culture in order that the water right may become vested?
4. Where land owned by the king in ancient time was in taro culture, is it necessary that such land be in taro culture at the time that adjoining taro lands were granted under Land Commission Awards, in order that such sovereign land be vested with appurtenant water rights?
5. Is there a distinction between normal surplus water and storm and freshet water? Assuming that there is a distinction, is the law the same on the ownership thereof?"

The opinion of the Supreme Court of Hawaii entered on January 10, 1973, with one Justice dissenting, does not mention, discuss or pass upon any Federal question.

Petitions for rehearing were filed by McBryde and by Gay & Robinson. A "Motion for Partial Vacation of Opinion and for Opportunity to Present Evidence and Argument" was also filed by Olokele Sugar Company, Limited.

On June 18, 1973, the Supreme Court of Hawaii entered an order directing McBryde, Gay & Robinson, the State of Hawaii and the Small Owners to file briefs limited to the issues as follows:[3]

"1. The pertinent portion of HRS §7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:

'The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.'

Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?

2. The parties in this action introduced evidence as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant?"

On June 29, 1973, Olokele was also ordered by the Court to file a brief directed to the same issues.

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[3]Order of June 18, 1973 (App. 108-109).

Oral argument was duly held limited to the issues specified in the order of June 18, 1973. On December 20, 1973, a *per curiam* affirmation of its prior opinion entered on January 10, 1973, was entered by a majority of the Supreme Court finding "no reason to change the decision filed herein."[4] The *per curiam* affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions.

QUESTIONS PRESENTED

1) Where federal constitutional questions are neither timely nor properly raised in proceedings to determine the rights of landowners to appurtenant, riparian, and surplus waters, and the Supreme Court of Hawaii does not pass on any federal question, does the jurisdiction of the United States Supreme Court attach on appeal from the state judgment?

2) Where the Supreme Court of Hawaii makes a determination of the rights of landowners to appurtenant, riparian and all surplus waters by construing for the first time a state statute and its decision is made upon a fair and substantial basis, does the jurisdiction of the Supreme Court of the United States attach on appeal from the state judgment?

3) Where a state statute involves the "rights of the people" to appurtenant, riparian and surplus waters, and the sole issue before the state courts is a determination of such water rights, is there a substantial federal constitutional question involved?

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[4] 55 Haw. at 260 (App. 114).

ARGUMENTS

I.

QUESTIONS WHICH APPELLANTS AND PETITIONERS SEEK TO HAVE REVIEWED WERE NEITHER PROPERLY RAISED NOR PRESENTED BELOW NOR DECIDED UPON BY THE SUPREME COURT OF HAWAII

In order for this Court to vindicate its jurisdiction to deal with the federal questions in this case, if any, this Court must inquire whether those questions were presented to the Supreme Court of Hawaii in such a manner that it was necessarily decided by the State Supreme Court when it affirmed its prior decision of January 10, 1973. If the questions were not so presented, then this Court has no power to consider it. See, *Bailey v. Anderson,* 326 U.S. 203, 206-207 (1945). Moreover, this Court has stated that when, as here, the highest State Court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party can affirmatively show the contrary. See, *Bailey v. Anderson,* supra; *Chicago I. & L. R. Co. v. McGuire,* 196 U.S. 128, 131-133 (1905).

In the separate appeals to the Supreme Court of Hawaii taken by McBryde, Gay & Robinson and the State of Hawaii, no Federal constitutional questions were raised. The issues involved were solely questions concerning the rights of landowners to appurtenant, riparian, and surplus waters.

Subsequent to the decision of the State Supreme Court on January 10, 1973, both appellants and peti-

tioners filed petitions for rehearing. However, in their petitions and briefs, although appellants and petitioners challenged the application of Hawaii Revised Statutes §7-1 to the determination of the water rights, at no time did they draw in question the validity and constitutionality of the statute itself. The opinion of the Supreme Court of Hawaii construes the applicability of Hawaii Revised Statutes §7-1 to the determination of the water rights of landowners; the opinion does not indicate that the State statute was drawn in question as being repugnant to the Constitution, nor does it appear from the opinion that a federal question was presented to or considered by the Court. Thus, even if this Court should find that federal questions were properly raised below, this appeal should be dismissed for failure of appellants and petitioners to explicitly attack the validity and constitutionality of the State statute and not merely its applicability. See *Charleston Fed. S. & Assn. v. Alderson,* 324 U.S. 182, 187 (1945).

Assuming *arguendo,* that federal questions were properly raised below, appellants and petitioners were not deprived of their constitutional right to a hearing pursuant to the Due Process Clause of the 14th Amendment.

Pursuant to the order of the Supreme Court of Hawaii entered on June 18, 1973, all parties to the action were directed to file briefs concerning (1) whether Hawaii Revised Statutes §7-1 is material to the determination of the water rights of the parties, and (2) under what principle or theory of law are

the landowners entitled to transport water. Appellants and petitioners were provided the opportunity to argue the validity and constitutionality of the State statute both in their briefs and upon oral argument. However, both appellants and petitioners chose to argue the applicability of Hawaii Revised Statutes §7-1 rather than its validity and constitutionality.

II.

THE DECISION OF THE SUPREME COURT OF HAWAII IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL AS TO REQUIRE PLENARY CONSIDERATION

The Supreme Court of Hawaii, prior to rendering its opinion of January 10, 1973, reflected back to the time of the Great Mahele of 1848 and reviewed its past decisions rendered in *Peck v. Bailey,* 8 Haw. 658 (1867); *Haw. Com. & Sugar Co. v. Wailuku Sug. Co.,* 15 Haw. 675 (1904); *Carter v. Territory,* 24 Haw. 47 (1917); and *Territory v. Gay,* 31 Haw. 376 (1930). The Court also reviewed the Principles of the Land Commission, Stat. L. Kamehameha III 81 (1847), prior to making a determination of the rights of the people to appurtenant, riparian, and surplus waters. The appurtenant water rights determined by the Court are synonymous with the ancient water rights which attached to *kalo* (taro) land measured by the quantum of water necessary to cultivate taro under the ancient system of taro cultivation.

In rendering its opinion, the State Supreme Court acknowledged the importance of their decision stating:

> "This court, like the United States Supreme Court has 'rejected a doctrine of disability at self-correction.' Helvering v. Hallock, [309 U. S. 106, 121 (1940)]. We believe that the doctrine of stare decisis is subordinate to legal reasons and justice and we should not be unduly hesitant to overrule a former decision when to do so would bring about what is considered manifest justice . . ."[5]

The Supreme Court of Hawaii for the first time construed Hawaii Revised Statutes §7-1 in determining the rights of the parties to appurtenant, riparian, and all surplus waters and clearly defined water right laws which were in the shaded area as the result of *Territory v. Gay,* 31 Haw. 376 (1930), where the three Justices differed on the law.

In *Patterson v. McCormick,* 99 S.E. 401, 405 (1919), the Supreme Court of North Carolina was faced with construction of a will which could have been decided adversely to the plaintiffs were it not for a statute which changed the common law. The Court there stated:

> "Where the statute is explicit and has been overlooked, the doctrine of stare decisis does not apply . . . when the statute and the precedents conflict the statute controls. The Courts cannot by a line of erroneous decisions overrule the statute."

A state has the power to determine its own peculiar rules of property rights in waters within its boundaries by statutes and Court decisions. In *Erie Railroad*

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[5]Decision of January 10, 1973 (App. 72).

Co. v. Tompkins, 304 U.S. 64, 78 (1938), the Court stated:

> "Except in matters governed by the federal constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by the Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Since a determination of property rights is a matter of local concern, the decision of the Supreme Court of Hawaii in construing Hawaii Revised Statutes §7-1 should not be overturned. The decision of the Court is rendered upon a fair and substantial basis and no federal questions are presented as to require plenary consideration by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed.

Dated, Honolulu, Hawaii,
May 23, 1974.

Respectfully submitted,
GEORGE PAI,
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By JOHNSON H. WONG,
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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

MCBRYDE SUGAR COMPANY, LIMITED and OLOKELE SUGAR COMPANY, LIMITED, *Appellants,*

v.

STATE OF HAWAII, ET AL., *Appellees.*

SELWYN A. ROBINSON, ET AL., *Petitioners,*

v.

STATE OF HAWAII, ET AL., *Respondents.*

IDA ALBARADO, ET AL., *Petitioners,*

v.

STATE OF HAWAII, ET AL., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii, and on Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

REPLY MEMORANDUM FOR THE APPELLANTS AND PETITIONERS

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On Appeal from the Supreme Court of the State of Hawaii, and on Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

REPLY MEMORANDUM FOR THE APPELLANTS AND PETITIONERS

Despite the breadth and gravity of the contentions raised by Appellants and Petitioners, the State of Hawaii, in its Motion to Dismiss and Response to Jurisdictional Statement, has addressed itself solely to the Fourteenth Amendment claims, and one of the jurisdictional issues posed by the appeal herein, and all in summary fashion. Its arguments fail to meet the issues raised and are inadequate.

1. As the State of Hawaii says, no federal or constitutional question was raised in the trial court, and

no federal or constitutional question was raised by any of the parties, including the State, when the case was first presented to the Supreme Court of Hawaii. No federal or constitutional question was raised at that time because there was no such issue in the case, either under the pleadings, or in the arguments made by any of the parties. Indeed, neither Stat. L. Kamehameha III, 81 et seq. (1847) nor Hawaii Rev. Stat. § 7-1 were cited or made the basis of any claim by any party, either in the trial court, or in the briefs filed before argument in the Supreme Court of Hawaii.

The federal and constitutional questions came into the case for the first time when the Supreme Court of Hawaii announced its decision. They are implicit and inherent in that decision, even though the Supreme Court of Hawaii did not deal with federal or constitutional questions in its opinion. Such questions were then considered in the dissenting opinion of Judge Marumoto (App. 93-209), and later in the dissenting opinion of Judge Levinson (App. 115-158).

The federal and constitutional questions were specifically raised and presented to the Supreme Court of Hawaii by the parties through petitions for rehearing which were timely filed after the decision of the court was announced. This was the first opportunity to raise these questions. An effort was made to present these questions in oral argument before the court, but this was refused by the court. In this situation, the fact that the Supreme Court of Hawaii did not consider these questions, and did not expressly dispose of them, is irrelevant as far as the jurisdiction of this Court is concerned. Indeed, the handling of these questions by the Supreme Court of Hawaii raises further questions under the procedural aspects of the Due Process Clause.

2. The primary basis for the State's opposition to this Court's review of the Hawaii Supreme Court's decision appears to be that Appellants and Petitioners had [1]

> "no vested property rights in judicial decisions which are contrary to the express wording of a statute which has been in existence in Hawaii since 1850 [Hawaii Rev. Stat. § 7-1]."

In support of this conclusion, the State relies on language in three judicial decisions—noticeably none by this Court.

The cases cited do not support the State's position. In *Bauman* v. *Smrha,* 145 F.Supp. 617 (D. Kan. 1956), the state statute alleged to be unconstitutional because it dedicated all water in the state of Kansas to its people and effected a state-wide transformation from a riparian to an appropriation system of water allocation was expressly made "subject to vested rights." (Kan. Gen. Stat. 1949, ch. 82a, §82a-703). [2] The decision in *In re Catherwood's Trust,* 405 Pa. 61, 173 A.2d 86 (1961), was based on the Pennsylvania Supreme Court's determination that an income beneficiary of a trust has no vested interest in accumulated unpaid corporate earnings on stock in the trust [3] and therefore any change in the rules affecting apportionment between life tenants and remaindermen could not be said to be a taking without compensation in violation of the Fourteenth Amendment. As in *Demorest* v.

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[1] Response, to Jurisdictional Statement, or, in the Alternative, Petitions for Writ of Certiorari, at 5.

[2] The statute continued: "Nothing in this act contained shall impair the vested right of any person except for nonuse."

[3] 173 A.2d at 90.

City Bank Farmers Trust Company, 321 U.S. 36 (1944), the Court distinguished the apportionment rules from rules of property. Finally, in *Patterson* v. *McCormick,* 177 N.C. 488, 99 S.E. 401 (1919), not only was no constitutional issue raised, but there did not in fact exist a consistent line of decisions on which the plaintiffs could reasonably have relied.

3. The State's assertion[4] that Appellants and Petitioners should not have relied on the decisions of the Hawaii Supreme Court delineating the system for allocation of water in Hawaii—because they were indefinite and failed to reconcile ancient Hawaiian water rights with the language of Hawaii Rev. Stat. § 7-1—is totally unfounded. In its decision in *McBryde I,* the Hawaii Supreme Court repeatedly acknowledged that it was overruling prior decisions;[5] and, in his dissenting opinion, Judge Levinson characterized the decision as "totally unforseeable," and a "radical departure" from "long established and unique principles of Hawaiian water law," "solidly bottomed in Hawaiian judicial precedent."[6] In view of these statements, it can hardly be contended that Hawaiian water law was in such a state of uncertainty or flux that the Appellants' and Petitioners' reliance on existing decisions was unreasonable.[7]

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[4] Response to Jurisdictional Statement, or, in the Alternative, Petitions for Writ of Certiorari, at 5-11.

[5] See Jurisdictional Statement, or, in the Alternative, Petition for a Writ of Certiorari to the Supreme Court of Hawaii, McBryde v. Hawaii, at 23, footnote 54.

[6] 55 Haw. at 302, 262, 265 (App. 156, 116, 119). It is the "sudden about face from these decisions" (App. 129) that impelled the dissenting opinion's treatment of the constitutional questions.

[7] See also "Partial List of Cases Overruled by the Decision Below," Jurisdictional Statement, or, in the Alternative, Petition for a Writ of Certiorari to the Supreme Court of Hawaii, McBryde v. Hawaii, Annex B, at 52-54.

The Motion to Dismiss makes no reference to Stat. L. Kamehameha III, 81 et seq. (1847), or to the Further Principles enacted by the Hawaiian Government on August 6, 1850, Hawaiian Laws 1850, p. 202, and the Further Principles are cited only in a footnote at the close of the Response to the Petitions for Certiorari. Yet, Stat. L. Kamehameha III, 81 et seq. (1847) and the Further Principles show clearly that the statute which has been periodically re-enacted and now appears as § 7-1 of the Hawaiian Revised Statutes, on which the State almost exclusively relies, could not have had the purpose and effect of reserving to the public the title to all surface waters attributed to it by the court below and by the State of Hawaii in its response. [8]

This emphasizes the fact that the decision of the Supreme Court of Hawaii overturns more than a century of settled land law in Hawaii, and amounts to a taking of property without compensation, and under the circumstances, without due process of law.

4. The State of Hawaii, in its Response, makes no reference whatever to the res judicata contention, and the related Supremacy Clause and full faith and credit issues, which are particularly relied on by Olokele Sugar Company and by Selwyn A. Robinson, et al. Indeed, the State of Hawaii, like the Supreme Court of Hawaii, makes no reference to the fact that the decision in *Territory* v. *Gay,* 31 Haw. 376 (1930), was affirmed by the Circuit Court of Appeals for the Ninth Circuit in 52 F.2d 356 (1931), and certiorari was denied, 284 U.S. 677 (1931). These issues, like the other issues in the case, are real and substantial,

[8] This is convincingly put by Judge Levinson in his dissenting opinion (App. 124): "For if all 'usufructs' of land were retained by the king, then nothing but bare legal title was passed by the Mahele and subsequent Land Commission Awards—a proposition which is patently incorrect if not absurd."

and are important not only to the parties but to the sound development of the law. They are not made less substantial and important by the failure of the State to deal with them in its response to the Jurisdictional Statement and the Petitions.

CONCLUSION

In substance, the State makes no answer to the contentions advanced in the Jurisdictional Statement and the Petitions for Certiorari. Those questions are substantial. The taking of property for public use, in these circumstances, involving disregard of more than a century of established property law, and the ignoring of a prior decision of the Court of Appeals for the Ninth Circuit, which is entitled to res judicata effect, presents a situation where the court below has so far departed from established principles of law as to merit review of its decision by this Court.

Respectfully submitted,

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June, 1974